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No.

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In The

Supreme Court of the United States

October Term, 1996

ARREST THE INCINERATOR REMEDIATION (A.I.R.), INC.,

Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; CAROL BROWNER, Administrator, United States Environmental Protection Agency,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit holding, that citizens must wait until completion of a remedial action by the U.S. EPA to institute suit in federal court to require EPA to comply with federal and state laws designed to protect public health and to enjoin EPA actions that threaten their lives, is in error as contrary to decisions of the Supreme Court of the United States that recognize the constitutional right of access to the courts at a Meaningful time, and that recognize the inherent power of the courts to strike down lawless agency action (the *Leedom* rule), where the EPA action is taken in excess of its delegated authority, is in violation of specific mandates in federal statutes, and, if judicial review is postponed, will result in the irreparable loss of life, liberty and property of citizen plaintiffs and members of the public due to exposure to toxic chemicals?

2. Whether the Third Circuit holding that the sovereign immunity doctrine defeats citizens' rights under the Constitution to Petition Government for Redress via Access to the Courts is in error as contrary to the current doctrine of sovereign immunity, and if not, whether the time has come in this modern constitutional democracy for the Supreme Court to abandon or significantly alter the doctrine of sovereign immunity which has its roots in the outmoded monarchial concept that "the King can do no wrong," a concept rejected in the Declaration of Independence, and antithetical to the Constitution's recognition of the rights of the people and the limits of government power?

3. Whether the Third Circuit, in direct conflict with the decisions of the Tenth and Eleventh Circuits, erred in failing to interpret CERCLA and the Resource Conservation and Recovery Act (RCRA), both closely related federal statutes governing disposal and treatment of hazardous and toxic chemicals, so as to give effect to all of their provisions and to harmonize the

two, resulting in the evisceration both of important rights of citizens under the statutes and of important public health and environmental protection requirements imposed by Congress on those who manage and dispose of hazardous wastes?

4. Whether allowing pre-completion judicial review of EPA CERCLA response actions by the corporate wrongdoer (potentially responsible party) who seeks to protect their financial interests while denying such review to citizen's acting as private attorneys general to enforce CERCLA and to protect their lives, health and property offends Fifth Amendment principles of equal protection?

LIST OF PARTIES

The Clinton County, Pennsylvania Commissioners were a Plaintiff and Appellant below, in addition to A.I.R., Inc., the Petitioner listed in the caption of the case.

Both Defendants/Appellees below, the U.S. Environmental Protection Agency and Carol Browner, administrator of the U.S. EPA, are listed in the caption of the case as Respondents.

There is no parent or subsidiary company of any party to be listed.

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V. Allowing Pre-Completion Judicial Review Of EPA CERCLA Response Actions By The Corporate Wrongdoer (Potentially Responsible Party) Who Seeks To Protect Their Financial Interests While Denying Such Review To Citizen's Acting As Private Attorneys General Under CERCLA And Acting To Protect Their Lives, Health And Property Offends Fifth Amendment Principles Of Equal Protection. 27

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APPENDIX

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States: A.I.R., Inc., a non-profit incorporated Pennsylvania community group, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, En Banc, entered in this matter on June 26, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, upholding the decision to dismiss for want of jurisdiction by the United States District Court for the Middle District of Pennsylvania (D.C. Civil Action No. 96-cv-00181) is reported at __ F.3d __ (3d Cir. 1997). The decision of the Court of Appeals is printed in the Appendix hereto, *infra*, at 1a. The opinions of the District Court are unreported. The two decisions of the District Court are printed in the Appendix hereto, *infra*, at 26a and 31a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*, at 1a) was entered on June 26, 1997, En Banc. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. I:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. V:

> No person shall . . . be deprived of life,

> liberty, or property without due process of law . . . .

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, ("CERCLA" or "Superfund") as amended by the Superfund Amendments and Reauthorization Act of 1986, ("SARA" Pub. L. No. 99-499, 100 Stat. 1613 *et seq.* (1986)), relevant provisions:

> 42 U.S.C. §9613(h).
>
> No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:
>
> > (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
>
> 42 U.S.C. § 9652(d).
>
> Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, with respect to releases of hazardous substances or other pollutants or contaminants.

42 U.S.C. § 9659.

> Except as provided in . . . section 113(h) . . . (relating to timing of judicial review), any person may commence a civil action on his own behalf —
>
> (1) against any person (including the United States and any other . . . or agency . . .) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this Act . . .; or
>
> (2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency . . . where there is alleged a failure of the President or such other officer to perform any act or duty under this Act . . . which is not discretionary . . . .

42 U.S.C. § 6961 (Federal Facilities Compliance Act, text in Appendix).

42 U.S.C. § 6972 Citizen Suits (Resource Conservation and Recovery Act, text in Appendix)

STATEMENT OF THE CASE

On June 26, 1997, the United States Court of Appeals for the Third Circuit filed its decision in *Clinton County Commissioners et al. v. U.S. EPA et al.*, __ F.3d __ (3d Cir. 1997), which would allow citizens to sue EPA regarding illegal and dangerous hazardous waste remedial actions only after completion of EPA's actions, even where the EPA action

threatens citizens' lives and properties through exposure to toxic chemicals. In short, the Third Circuit decision denies citizens any effective remedy through the federal courts from the harm resulting from EPA's improper remedial actions by prohibiting citizens access to the federal courts until after the EPA action is complete and the harm has occurred.

Petitioners filed their complaint in the United States District Court for the Middle District of Pennsylvania February 1, 1996. In their Complaint, petitioners invoked the District Court's jurisdiction in five separate counts:

> A RCRA count alleging an imminent hazard to public health from the EPA hazardous waste incinerator trial burn at the Drake Chemical NPL site in a residential neighborhood.
>
> A RCRA count alleging EPA failure to achieve the required hazardous waste destruction efficiency.
>
> A RCRA count alleging an imminent hazard to public health from the operation of the EPA hazardous waste incinerator at the Drake Chemical NPL site.
>
> A CERCLA count alleging that EPA was in violation of its statutory mandate to protect public health and the environment during its Superfund actions.
>
> A CERCLA and NEPA count alleging that EPA's decision process was illegal in having failed to adequately assess the harmful impacts from the proposed hazardous waste incineration project on residents, farmers, and the food supply, and the safer alternatives to the proposed action.

Petitioners relied on several bases for jurisdiction in the District Court:

42 U.S.C. § 9659 (CERCLA Citizen Suit provision of jurisdiction and waiver of immunity);

42 U.S.C. § 6972 (RCRA Citizen Suit provision of jurisdiction and waiver of sovereign immunity);

28 U.S.C.§ 1331 (federal question jurisdiction);

42 U.S.C. § 6961 (waiver of sovereign immunity for hazardous waste violations);

The United States Constitution, Amendments One and Five, which guarantee Access to the Courts at a meaningful time;

The United States Supreme Court precedent in the *Leedom v. Kyne*, 358 U.S. 184 (1958), line of cases.

The statutorily required Notices of Intent to Sue were filed by Plaintiff A.I.R., Inc and Plaintiff Clinton County Commissioners.

Below, the Plaintiffs relied on the holding in the Third Circuit decision in *United States v. Princeton Gamma Tech, Inc.*, 31 F.3d 138 (3d Cir. 1994), which concluded that the District Court would have subject matter jurisdiction over Superfund Citizen Suits that present *bona fide* allegations of irreparable harm during the pendency of an EPA Superfund cleanup. The District Court, adopting the EPA view of the jurisdictional controversy, dismissed Petitioner's Complaint for lack of subject matter jurisdiction. A panel of the Third Circuit reversed, adopting Petitioner's view and standing by *Princeton Gamma Tech*. The Third Circuit, En Banc, reversed the Third Circuit panel decision on this issue, dismissed Petitioner's Complaint for lack of jurisdiction, and overruled *Princeton Gamma Tech*. The Third Circuit En Banc decision is the subject of this Petition.

In filing the five count Complaint described above, the Petitioner sought to require EPA to comply with applicable law during its Superfund action, and to enjoin the United States Environmental Protection Agency ("EPA") from conducting a test burn and subsequent operation of a hazardous waste incinerator at the Drake Chemical Superfund site due to concern, reflected in the five counts, that the EPA action was illegal and unacceptably and unnecessarily dangerous. On the day the Complaint was filed, Petitioner filed a Motion for a Preliminary Injunction and a Temporary Restraining Order, and a Memorandum in support thereof.

Pursuant to District Court Orders dated February 7, 23, and 29, 1996, the EPA agreed to keep the incinerator shut down until a decision could be reached on Petitioner's preliminary injunction motion. On March 4 through 7, 1996, the District Court held an evidentiary hearing on the preliminary injunction motion. Petitioner offered affidavits, live testimony, expert opinion, and government documents in support of its allegations of fact that the EPA's planned incineration of hazardous wastes and contaminated soils at the Drake Superfund site, located in a residential area and near farmland, would result in the emission of dangerous amounts of highly toxic chemicals including ultra toxic dioxin and dioxin-like compounds, would cause irreparable harm to Petitioner and the public, constituted an imminent and substantial endangerment pursuant to the federal Resource Conservation and Recovery Act (RCRA), and evidenced a failure by EPA to protect public health and the environment in violation of EPA's mandate under the Superfund statute (the Comprehensive Environmental Response Compensation and Liability Act or CERCLA).

Prior to the conclusion of that hearing, the EPA admitted that there were problems with its health risk assessment for the Drake site incineration project and that it wished to have the preliminary injunction hearing continued until it could fix the

problems with its health risk assessment. EPA agreed to keep the incinerator shut down while EPA performed the changes to the risk assessment and then until the District Court ruled on the preliminary injunction motion. Petitioner agreed and this agreement was embodied by the District Court in its March 8, 1996 Consent Order which prohibited the EPA from proceeding with the trial burn process for the Drake Incinerator and from incinerating waste and soil until EPA had completed revisions to its health risk assessment for the project and until further order by the District Court.

On August 14, 1996, prior to resumption of the preliminary injunction hearing, the District Court issued an order dismissing the case for lack of subject matter jurisdiction. On August 28, 1996, the Plaintiff Clinton County Commissioners and Petitioner A.I.R., Inc. filed a Motion to Reconsider the August 14, 1996 dismissal order. On October 1, 1996, the District Court denied that motion but granted Petitioner's request for expedited decision.

Petitioner and co-Plaintiff Clinton County Commissioners filed a timely notice of appeal with the Third Circuit. On November 6, 1996, Petitioner filed a Motion for Injunction Pending Appeal in the District Court, alleging that the recent incidents at the Drake site demonstrate that the operation of the Drake site incinerator is an even greater danger than Petitioner had reason to believe at the time of the Preliminary Injunction Hearing. The Petitioner alleged and attached exhibits to the Motion for Injunction Pending Appeal to support the allegations that the operators of the Drake site incinerator had operated this hazardous waste incinerator with the critical and legally required safety interlocks/automatic waste feed shutoff systems inoperable and possibly intentionally circumvented. The evidence filed in support of Petitioner's Motion for Injunction Pending Appeal includes:

* Affidavits of local residents living in close proximity to the Incinerator testifying to the recent development — since the incinerator began operating — of a pattern of illnesses in their children of a serious and difficult to diagnose nature.

* EPA and Army Corps of Engineers' Reports for the Drake Chemical Superfund Site Trial Burn Phase, which describe a pattern of malfunctions of the incinerator, violation of critical regulatory safeguards, failure of quality control procedures for dioxin emissions testing, failure of the combustion gas quench system — a critical component for dioxin emissions pollution control, use of the thermal relief valve — emergency bypass stack, failure of the acid gas emissions control system, and failure to even effectively remove the toxic chemical contaminants from the soil being treated.

* "Preliminary Report Regarding Shakedown and Trial Burn Activities at the Drake Chemical Superfund Site," dated October 18, 1996, prepared for A.I.R., Inc. by their EPA Technical Assistance Grant contractor, the Government Accountability Project, documenting the pattern of incinerator failures.

Following the filing of this motion, the parties reached an agreement that Plaintiffs would withdraw the Motion for Injunction Pending Appeal in relation to EPA's trial burn of the incinerator and in return EPA would agree to cease any further burning of waste until at least May 15, 1997, and the parties would join in a Motion to Expedite the Appeal. A joint Motion to Expedite the Appeal was granted by the Court of Appeals on November 26, 1996.

The Third Circuit Panel decided the appeal in Petitioner's favor after oral argument on February 7, 1997, finding that the

District Court erred in not following Third Circuit precedent in *Princeton Gamma Tech* which held that the District Court had jurisdiction to hear a citizen suit such as Petitioner's that alleged irreparable harm during the pendency of an EPA Superfund cleanup. However, the Panel recommended the case be heard En Banc and the Third Circuit accepted the case for review En Banc, issuing its opinion on June 26, 1997 which reversed the Panel, overruled *Princeton Gamma Tech*, and dismissed Petitioner's Complaint. This Petition followed.

REASONS FOR GRANTING THE WRIT

I. ASSUMING ARGUENDO, THAT 42 U.S.C. § 9613(h) ON ITS FACE LIMITS JURISDICTION OF PETITIONER'S CLAIMS, THE THIRD CIRCUIT'S FAILURE TO RECOGNIZE THE "STATUTORY AUTHORITY" OR "*LEEDOM*" EXCEPTION TO STATUTORY JURISDICTIONAL LIMITATIONS IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT.

> Decency, security and liberty alike demand that government officials shall be subjected to the rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law, it invites every man to come a law unto himself. It invites anarchy.

United States v. Olmstead, 277 U.S. 438 (1928).

This Court has established long-standing precedent that recognizes the power of the federal courts to serve as a check on abuse of power by the Executive Branch. Assuming, for the sake of this argument, that the Third Circuit's interpretation of CERCLA § 113(h)) is correct, the Court of Appeals' refusal to accept jurisdiction over this case for the sole purpose of striking down the illegal actions of EPA, directly conflicts with the prior well established precedent of this Court. In failing to act to correct the blatantly lawless acts of the EPA, the Third Circuit positioned itself directly in conflict with the decisions of this Court which dictate that the courts have jurisdiction over cases where agencies have exceeded their authority or ignored a specific statutory prohibition, notwithstanding statutory limits on judicial review that might otherwise apply. Judicial oversight of the Executive Branch is one of the most important roles of the judiciary in this modern constitutional democratic society.

In *Leedom v. Kyne*, 358 U.S. 184 (1958) this Court had cause to exercise its oversight responsibility over the National Labor Relations Board (NLRB). In reviewing the decisions of the lower courts, this Court held that the courts had general jurisdiction to "strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." *Leedom*, 358 U.S. at 188. The Court reasoned that Congress had provided the professional employees with a specific right to vote on whether or not to accept non-professional employees in their bargaining unit. The NLRB deliberately violated the employees' statutory rights when it refused to allow them to vote on the issue. The Court determined that when Congress limited judicial review of NLRB decisions, it could not have intended to eliminate "judicial protection of rights it confers against agency action taken in excess of delegated powers." *Leedom*, 358 U.S. at 190. Where Congress has given a right it must intend for that right to be enforced.

The parallels between *Leedom* and Petitioner's case are

striking. Like the NLRB in *Leedom*, EPA has attempted to hide behind statutory protections limiting judicial review, and has trampled specific rights provided by Congress for citizens affected by NPL site clean ups. The loss of rights at stake for Petitioners is far greater in this case than the bargaining rights of professional employees defended in *Leedom*.

Another parallel emerges between Petitioner's case and *Leedom* when the decision of the Third Circuit is compared with the dissenting opinion in *Leedom*. In *Leedom* Justices Frankfurter and Brennan dissented arguing that the limitations upon judicial review were a purposeful effort by Congress to limit "time-consuming court procedures [that] would seriously threaten to frustrate the basic national policy of preventing industrial strife . . . ." *Leedom*, 358 U.S. at 191. The Third Circuit used a similar argument to support its dismissal of Petitioner's case based on Congress' desire to avoid delay in Superfund actions occasioned by citizen litigation. Third Circuit Opinion at 10-11, 20, App. 13a-15a, 25a. However, consistent with this Court's holding in *Leedom*, whether the important statutory objective involves preventing industrial strife or cleaning up NPL sites without delay, agency actions that contradict unambiguous statutory mandates cannot be tolerated by the courts.

As explained *infra*, Petitioner does not agree with the Third Circuit's interpretation of their rights under CERCLA. However, if the Third Circuit's statutory analysis is deemed to be correct, and judicial review of EPA's illegal and irreparably harmful actions under CERCLA is intended by Congress to be limited by CERCLA taken as a whole and together with related statutes such as RCRA, then the court's authority under the *Leedom* line of cases should be invoked to strike down EPA's illegal actions identified in Petitioner's Complaint and filings below. By failing to utilize the *Leedom* exception the Third Circuit abdicated an important judicial responsibility to hold EPA accountable for actions taken beyond the scope of its delegated powers.

Therefore, the Third Circuit's decision directly conflicts with this Court's precedents and must be subjected to thorough review by this Court.

The Third Circuit, in its Opinion at 19-20, App. 22a-25a, rejected the application of the *Leedom* doctrine based on the view that more recent decisions of this Court interpreting *Leedom* have found the *Leedom* rule inapplicable when there is a clear statutory prohibition of review. However, apart from the fact that CERCLA does not provide a "clear" prohibition of review in Petitioner's case when CERCLA § 113(h) is considered in the context of the entire CERCLA, including the citizen suit provision and savings clause. 42 U.S.C. §§ 9659, 9652(d), and the muddled legislative history, the Third Circuit misreads the recent decisions of this Court.

A recent decision of this Court, *Board of Governors of the Federal Reserve System of the United States v. MCorp Financial, Inc., et al.*, 502 U.S. 32, 112 S. Ct. 459 (1991), recognizes and reiterates the important propositions found in *Leedom*. After filing bankruptcy petitions, MCorp, a bank holding company, pursued proceedings in the bankruptcy court against the Board of Governors of the Federal Reserve System (Board) to enjoin the prosecution of two pending administrative proceedings. The district court transferred the administrative proceedings to its docket and entered a preliminary injunction halting the administrative proceedings. The Court of Appeals found 12 U.S.C. § 1818(i)(1) deprived the district court of jurisdiction while at the same time interpreted *Leedom v. Kyne*, 358 U.S. 184 (1958) to authorize an injunction against any administrative proceeding which exceeded its statutory authority, and remanded the case with instructions to enjoin the Board from enforcing the regulation. While this Court found the Court of Appeals erred in its reading of *Leedom*, as applied to the facts in *MCorp*, in so doing the Supreme Court reaffirmed the *Leedom* rule in a manner

that makes clear that the Third Circuit has misunderstood and misstated the rule of law established by this Court .

The Supreme Court distinguished the Court of Appeals reliance on *Leedom* in two important ways. First, unlike the situation in *Leedom* and the Petitioner here, the Financial Institutions Supervisory Act (FISA) provided MCorp with a meaningful and adequate opportunity for judicial review. "The case before us today is entirely different from *Kyne* because FISA expressly provides MCorp with a meaningful and adequate opportunity for judicial review of the validity of the source of strength regulation." *MCorp*, 112 S. Ct at 466. In other words, if the Board determined MCorp had violated a regulation, MCorp had the right to review the regulation and its application in the Court of Appeals. This can be distinguished from *Leedom* and Petitioner's Superfund case here where "the Board's [NLRB] interpretation of the Act would deprive the union of a meaningful and adequate means of vindicating its statutory rights." *Id.* at 466 This Court further distinguished *Leedom* and found that the plain language in FISA's 12 U.S.C. § 1818(i)(1) indicated Congress was clear and unambiguous on preclusion of review, which as noted, is simply not a fair characterization of CERCLA and §113(h). As the Third Circuit noted in the now overruled *Princeton Gamma Tech* decision:

> Subsection 9613(h)(4) grants a district court jurisdiction to review challenges raised by a citizens' suit, but some doubt exists about when such a suit may be entertained. The legislative history on that point is confusing, and the issue is a troublesome one that has been the subject of several appellate opinions.

Princeton Gamma Tech at 144-45.

Even if this Court were to find that CERCLA provided a clear prohibition on review, the *Leedom* rule, as interpreted by this Court in *MCorp*, would still apply to provide jurisdiction in the instant case because, unlike in *MCorp*, the second critical criteria, availability of an alternative adequate opportunity for judicial review is not satisfied here. Petitioners here have no other recourse, but must watch the illegal agency action proceed to harm their families and property with no option but to complain after the fact. Certiorari should be granted because the Third Circuit has clearly departed from the rule established by this Court in *Leedom* and *MCorp*. That departure is of great public importance because it effectively removes the Judiciary from its critical role of oversight of the Executive Branch's exercise of power, a role central to the Constitutional system of checks and balances and separation of powers.

II. THE THIRD CIRCUIT'S DECISION DENYING JUDICIAL REVIEW OF EPA'S FAILURE TO COMPLY WITH PROVISIONS OF CERCLA, RCRA AND NEPA IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The Third Circuit's opinion conflicts directly with decisions of at least two other Circuit Courts of Appeals: *United States v. State of Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 510 U.S. 1092 (1994); and *Alabama v. EPA*, 871 F.2d 1548 (11th Cir.), *cert. denied*, 493 U.S. 991 (1989). *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), is directly on point on the question of the relationship between RCRA citizen suits, CERCLA cleanup actions, and the timing of judicial review limitations in CERCLA, 42 U.S.C. § 9613(h). In *Colorado*, the United States contended that the Colorado Department of Health could not enforce an order requiring compliance with the Colorado Hazardous Waste Management Act, issued under authority delegated by EPA under RCRA, for a CERCLA cleanup action at an Army hazardous waste facility because

§ 113(h) deprived the district court of jurisdiction prior to the completion of the cleanup. Reversing the district court's decision, the Tenth Circuit rejected the government's argument and held that within its statutory context, § 113(h) cannot be interpreted to include actions to enforce RCRA among the "challenges" to CERCLA response actions it prohibits. *Id.*, at 1575.

The court recognized that to the extent that the language in 113(h) has more than one interpretation, it must be interpreted to harmonize with CERCLA as a whole and with other related federal statutes. *Id.* The court then turned to the CERCLA savings provision which reads in relevant part:

> Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, with respect to releases of hazardous substances or other pollutants or contaminants.

42 U.S.C. § 9652(d). The court found that by interpreting § 113(h) to bar enforcement of the Colorado Hazardous Waste Management Act, the district court "effectively modified the Army's obligations and liabilities under [the Act] contrary to 9652(d) . . . ." *Id.*, at 1576. Accordingly, the court re-examined the language of § 113(h) and made a "critical distinction" between review of CERCLA actions (which are not circumscribed by § 113(h)) and review of *challenges* to CERCLA actions (which are). *Id.* It held that, in light of CERCLA as a whole, a "challenge" under § 113(h) was not intended to include enforcement of hazardous waste laws. *Id.*

The court also found this interpretation to be required by the language of RCRA's citizen suit provision, 42 U.S.C. § 6972. It first observed that RCRA contemplates two types of citizen suits — imminent hazard suits and enforcement suits — and

that Congress explicitly delineated the limits on invoking each, including certain limits where CERCLA actions were involved. It then noted that none of the prohibitions on citizen enforcement suits include where a CERCLA response action is underway (*see* 42 U.S.C. § 6972 (b)(1)(B)). *Id.* The Tenth Circuit noted that a citizen imminent hazard suit would only be prohibited where the EPA is already diligently addressing the *(same)* hazard (alleged by citizens through a CERCLA action) (*see* 42 U.S.C. § 6972 (b)(2)(B)).

The *Colorado* court found the statutory scheme unambiguous: "Congress clearly intended that a CERCLA response action would not prohibit a RCRA citizen enforcement suit," *Id.*, at 1578. The Tenth Circuit determined that any possibility that Congress intended CERCLA to implicitly repeal RCRA's citizen suit provision was eliminated by the clear language of 9652(d). *Id.*, at 1579.

The *Colorado* court found that its interpretation of section 113(h) not only harmonizes statutory provisions but also comports with Congress' expressed purpose in enacting the timing provision: "to prevent *private responsible parties* from filing dilatory, interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities." *Id.*, at 1576 (quoting H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 266 (1985) (emphasis added)). Such a situation did not exist in *Colorado*:

> Rather than challenging the Army's CERCLA remedial action, Colorado is attempting to enforce the requirements of its federally authorized hazardous waste laws and regulations, consistent with its ongoing duty to protect the health and environment of its citizens.

Id. at 1578.

Like the Colorado Department of Health in *Colorado*, Petitioner in the instant case is attempting to enforce, *inter alia*, the federal hazardous waste laws. The Petitioner's suit is not a "challenge" to the action under 113(h). As *Colorado* makes clear, Congress did not contemplate that citizens would be prevented from enforcing hazardous waste laws designed to protect the health and safety of the public when it enacted CERCLA § 113(h) in the context of the entire CERCLA and RCRA statutory scheme. The Third Circuit was correct in *Princeton Gamma Tech* when it found:

> **We are persuaded that when irreparable harm to public health or the environment is threatened, an injunction may be issued under the citizens' suit exception of subsection 9613(h)(4) even though the cleanup may not yet be completed. As discussed earlier, delay in preventing such injury is contrary to the objectives of CERCLA [Superfund] and results in the evisceration of the right to the remedy envisioned by the citizens' suit provision. We are convinced that Congress did not intend such a result.**

Id. at 148-49 (emphasis added).

Alabama directly conflicts with the Third Circuit opinion in several ways. The most blatant and most fundamentally important conflict is that in the *Alabama* opinion, contrary to Third Circuit's limited reading of the case, Third Circuit Opinion at 11, App. at 14a, the Eleventh Circuit held that it actually had jurisdiction to review plaintiffs' claims that EPA had violated the Superfund statute and had illegally denied notice and rights to participate in the development of the record of decision. *Alabama*, 871 F.2d at 1559. "To the extent plaintiffs' complaint

may in part be read as not challenging the remedial action plan and therefore not removed from federal jurisdiction by section 113(h), we address the merits of plaintiffs' claims . . . ." *Id.* The Alabama court went on to decide the merits of the allegations of plaintiffs there that CERCLA had been violated. *Id.* The *Alabama* court stated "[t]o the extent plaintiffs challenge the EPA's cleanup under section 117(a) and (b), it is clear that EPA has complied . . . ." *Id.* "Consequently, we reverse . . . ." *Id.* Clearly, the Eleventh Circuit held that it had jurisdiction and gave plaintiffs a hearing on the merits of their claims that EPA violated Superfund requirements.

Certiorari should be granted here because the Third Circuit, in direct conflict with the decisions of the Tenth and Eleventh Circuits, erred in failing to interpret CERCLA and the Resource Conservation and Recovery Act (RCRA), both closely related federal statutes governing disposal and treatment of hazardous and toxic chemicals, so as to give effect to all of their provisions and to harmonize the two, resulting in the evisceration both of important rights of citizens under the statutes and of important public health and environmental protection requirements imposed by Congress on those who manage and dispose of hazardous wastes.

III. THE RIGHT OF ACCESS TO THE COURTS, AND THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS FOUND IN THE FIFTH AND FIRST AMENDMENTS, IN THE CONTEXT OF NON-EMERGENCY HAZARDOUS WASTE CLEANUPS UNDER CERCLA, REQUIRE MORE THAN AFTER THE FACT JUDICIAL REVIEW AND, IF IN CONFLICT, THE OUTMODED MONARCHIAL DOCTRINE OF SOVEREIGN IMMUNITY MUST GIVE WAY TO THE CONSTITUTION, THE SUPREME LAW OF THE LAND.

The Third Circuit decision effectively prohibits all judicial review until it is too late for Petitioner to prevent deprivation of its lives, health, liberty and property by federal agency action. This decision therefore works a violation of Petitioner's constitutional right of Access to the Courts at a meaningful time. While citizens do not have a right to a particular form of remedy, there is a guarantee, under the due process clause, that a citizen's substantial right to redress by some effective procedure will be preserved. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). Other courts have similarly held that a right to a judicial hearing must be made at a meaningful time. *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-437 (1982).

Like the situations in *Boddie*, *Logan*, *Fuentes*, and others, Petitioners are being denied any timely and meaningful opportunity to protect their rights in the courts. Their health, property, and environment are threatened by EPA proceeding with an illegal and harmful hazardous waste response action in their community. In order for Petitioner to protect its lives, health, property and environment, they must have timely access to the courts. Congress' acknowledgement of this fact is shown

in the inclusion of citizen suit provisions in almost all recent environmental legislation.

However, even if Congress has the option of withdrawing the citizen suit option, Petitioner should still have available to it an action under the Constitution to seek injunctive relief to prevent the unjustified governmental deprivation of their property, health, liberty and even lives.

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 1 Cranch 137, 163 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, supra, at 390-395, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment.

See Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

Such a constitutional claim, whether denoted a claim for violation of substantive due process, procedural due process, or at this stage, denial of the right to Access to the Courts, was fairly implied in the Petitioner's Complaint which alleged that U.S. EPA actions threatened to deprive Petitioner's members of their health, property, and lives. Even if not fairly read into the original Complaint, Petitioner would amend the Complaint to state such a claim in light of the unanticipated reversal of *Princeton Gamma Tech* by the Third Circuit, En Banc, which effectively removed Petitioner's previously clearly recognized citizen suit options for judicial review.

The Third Circuit decision, however, appears to adopt the two-part District Court holding that (1) a CERCLA citizen suit is the exclusive federal court remedy available for citizens harmed by EPA Superfund actions and (2) that CERCLA citizen suit has been made unavailable by Congress until after the fact. This Third Circuit decision, then, effectively forecloses citizen access to the federal courts until after the agency action has unjustly deprived Petitioner's members, or any other affected citizens living near the more than 1,000 Superfund NPL sites nationwide, of their constitutionally protected interests in life, liberty and property.

It is true that Congress intended, and the government has an interest, which the public shares, in not delaying urgently needed hazardous waste cleanups. However, EPA has been provided means for dealing with emergencies through its powers to conduct immediate removal actions. However, although some removal actions have been taken at the Drake Chemical Superfund site, the cleanup of the contaminated soils which is the subject of the instant action has been delayed by EPA since 1982. The government can hardly now declare it an emergency.

The intent of Congress is to have EPA conduct cleanups as quickly as possible *in accordance with law*, so that proper care is taken. There is no compelling government interest in recklessly rushing to conduct a cleanup in a careless and illegal fashion. The Third Circuit's decision deprives Petitioners of not only their ability to sue to enforce CERCLA, RCRA and NEPA but also deprives them of their fundamental right to access to the courts to petition their government peaceably for redress in the face of reckless handling of deadly hazardous wastes. This reckless handling of hazardous wastes equates to violent crime and improper use of deadly force in other legal contexts. In cases where plaintiffs offer substantial evidence of illegal and irreparably harmful action by EPA or its contractors during a Superfund cleanup, postponement of judicial review of the

illegal and dangerous agency action is not supported by any compelling government interest. The Third Circuit's decision represents a fundamental violation of due process and directly conflicts with the above cited decisions of this Court in removing from Petitioner any federal forum in which it can seek an effective remedy.

The limitation on the federal courts' jurisdiction to hear citizen suits advocated by the EPA and adopted by the District Court below is not just a timing restriction, it is a complete extinguishment of citizens' rights to meaningful access to the courts. As such, it is unconstitutional. *See Cabot Corp. v. EPA*, 677 F. Supp. 823, 829 n. 6 (E.D. Pa. 1988); Michael P. Healy, *Judicial Review and CERCLA Response Actions*, 17 Harvard Environmental Law Review 1 1993, at 48-50. This Court has clearly recognized the constitutional right of Access to the Courts.

> In *United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L. Ed. 2d 626 (1973), we agreed that a due process right of access to the courts exists when fundamental interests are present and the State has exclusive control over "the adjustment of [the] legal relationship[s]" involved. Id., at 445, 93 S.Ct., at 637.

Logan, 429-30, note 5.

> In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972), we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. . . . We should be sensitive to these First Amendment values in construing the NLRA in the present context.

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741-743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983).

> The Court stressed that the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government, concluding that the NLRA must be construed in such a way as to be "sensitive" to these First Amendment values.

Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883, 896-97.

> "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.*, at 138, 81 S.Ct., at 530.
>
> We followed that view in *United Mine Workers v. Pennington*, 381 U.S. 657, 669--671, 85 S.Ct. 1585, 1592-1594, 14 L.Ed.2d 626.
>
> The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

The Third Circuit rejected Petitioner's constitutional arguments by concluding that these arguments were inconsistent with established principles of sovereign immunity. Third Circuit opinion at 13-14, App. at 16a-17a. However, the EPA's sovereign immunity, and that of all other federal agencies involved in hazardous waste activities, was clearly waived by Congress, at least in regards to Petitioner's RCRA hazardous waste violation claims, in the passage of the Federal Facilities Compliance Act. 42 U.S.C. § 6961 (text in Appendix) (enacted six years after CERCLA § 113(h)).

Further, to the extent that Petitioner seeks to redress a constitutional violation by EPA, there should be no need for Congress to decide whether or not to allow Petitioner to sue the government, *i.e.*, whether to waive sovereign immunity, when the drafters of the Constitution have already made clear citizens' right to do so under the Constitution. Does Congress really have the authority to preclude citizen access to the courts to seek an injunctive remedy for violations of constitutional rights by federal agencies based on the outmoded monarchial doctrine of sovereign immunity? Petitioner thinks not and urges this Court to make this rule clear by granting the petition for certiorari and reaffirming the right of citizens to access the courts to petition for redress at a meaningful time, even if it means abandoning or revising the (too) long-standing doctrine of sovereign immunity.

IV. BECAUSE MILLIONS OF LIVES AND BILLIONS OF DOLLARS ARE AT STAKE IN THE CONDUCT OF THE FEDERAL SUPERFUND HAZARDOUS WASTE CLEANUP PROGRAM, THE ISSUES PRESENTED IN THIS CASE, ISSUES REGARDING THE PROPER INTERPRETATION OF CITIZEN SUPERFUND ENFORCEMENT RIGHTS AND RIGHTS OF ACCESS TO THE COURTS WHEN LIVES, HEALTH AND PROPERTY ARE THREATENED BY WRONGFUL GOVERNMENT ACTION, ARE OF GREAT NATIONAL IMPORTANCE.

Does 42 U.S.C § 9613(h) really mark a boundary across which official lawlessness and denial of due process becomes immune from judicial review? The Third Circuit decision effectively decides that § 9613(h) is such an impenetrable boundary. The Third Circuit effectively places EPA above the law in its conduct in one of the most dangerous areas of federal government activity: hazardous waste cleanups.

The decision below completely undercuts the citizen enforcement strategy envisioned by Congress as a necessary complement to EPA enforcement, which can best be described historically as too little too late. Under the rule established by the Third Circuit, all courts in the Third Circuit will be forced to postpone citizen suits brought to enforce against EPA or industry violations of even the most fundamental requirements of Superfund, as here, until after the illegal action and remedy of which it is part are complete. Violation of any and all of the safeguards painstakingly crafted into the Superfund statutory scheme by Congress are insulated from citizen enforcement under the holding of the Third Circuit (as well as all the safeguards of NEPA the Clean Water Act, the Clean Air Act and the entire panoply of environmental laws).

This cannot be what Congress intended. The potential harm to public health and environment and potential waste of billions

of tax and industry dollars resulting from such unchecked misguided or blatantly lawless agency action is so great that it is unthinkable that Congress intended to place EPA so high above the law.

The Third Circuit failed to acknowledge that postponing citizen enforcement against EPA's statutory violations and postponing citizen mandamus actions against the agency's refusal to perform its statutory duties until such actions are moot, which is the clear consequence of the Third Circuit and District Court's rulings, effectively insulates the agency from enforcement of the very law Congress has charged EPA with upholding. This unwarranted preclusion of review encourages the very agency misconduct which Congress intended to combat by writing in the citizen suit provisions in the 1986 amendments to the Superfund statute.

The Second Circuit in *Browning-Ferris Industries of South Jersey, Inc. v. Muszynski*, 899 F.2d 151 (2d Cir. 1990) also acknowledged the importance of the jurisdictional issue surrounding interpretation of § 9613(h), and because of the sweeping impact interpretation of the section would have and the difficulty of the issue, declined to resolve the question. Instead, the Second Circuit decided the case on the merits after assuming jurisdiction *arguendo*. 899 F.2d at 154-155. "A comprehensive ruling on the jurisdictional issues would necessarily have a broad impact on future EPA pollution remediation efforts." *Id.* at 154. "Their resolution would necessarily have a broad impact on an important legislative scheme involving the expenditure of billions of dollars of tax and private money . . . ." *Id.* at 160. Such considerations add additional weight to the justification for issuance of a writ by this Court.

V. ALLOWING PRE-COMPLETION JUDICIAL REVIEW OF EPA CERCLA RESPONSE ACTIONS BY THE CORPORATE WRONGDOER (POTENTIALLY RESPONSIBLE PARTY) WHO SEEKS TO PROTECT THEIR FINANCIAL INTERESTS WHILE DENYING SUCH REVIEW TO CITIZEN'S ACTING AS PRIVATE ATTORNEYS GENERAL UNDER CERCLA AND ACTING TO PROTECT THEIR LIVES, HEALTH AND PROPERTY OFFENDS FIFTH AMENDMENT PRINCIPLES OF EQUAL PROTECTION.

The Third Circuit's discriminatory classification of citizen plaintiffs into a class that is denied pre-completion judicial review while responsible parties are apparently still placed in a class where such review is available, given the only partial overruling of *Princeton Gamma Tech*, represents a conflict with decisions of this Court upholding citizens' rights to equal protection. The Third Circuit opinion results in the wrongdoer having greater rights than citizens acting as private attorneys general, which is a gross miscarriage of justice.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 26, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-7683

CLINTON COUNTY COMMISSIONERS; ARREST THE INCINERATOR REMEDIATION, INC. ("A.I.R., INC."),

Appellants

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; CAROL BROWNER

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civil Action No. 96-cv-00181)

Argued February 7, 1997

BEFORE: STAPLETON and MANSMANN, *Circuit Judges,* and RESTANI,* *Judge, Court of International Trade*

Reargued En Banc April 16, 1997

BEFORE: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN,

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* Hon. Jane A. Restani, Judge of the United States Court of International Trade, sat by designation as a member of the original panel but did not participate in the en banc hearing.

Appendix A

NYGAARD, ALITO, ROTH, LEWIS and MCKEE,
Circuit Judges

(Opinion Filed June 26, 1997)

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Appendix A

OPINION OF THE COURT

STAPLETON, *Circuit Judge:*

Plaintiffs Clinton County Commissioners and Against the Incinerator Remediation, Inc. (AIR) brought this suit against the United States Environmental Protection Association (EPA) to enjoin EPA from proceeding with a trial burn and incineration remedy at the Drake Chemical Company site in Lock Haven, Pennsylvania. Plaintiffs allege that the incineration remedy would violate multiple federal environmental laws because it would release ultra-toxic substances into the air and thereby cause irreparable harm to nearby land and residents.

The district court dismissed plaintiffs' suit for lack of subject matter jurisdiction, concluding that the Judicial review provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) precluded the court from exercising jurisdiction, under any federal law, until EPA's remedial activities at the site are completed. The court also concluded that it lacked jurisdiction to review EPA's actions under *Leedom v. Kyne,* 358 U.S. 184 (1958), and that its failure to exercise jurisdiction did not deprive plaintiffs of any constitutional right of access to the courts. A panel of this court, considering itself bound by the earlier decision in *United States v. Princeton Gamma-Tech. Inc.,* 31 F.3d 138 (3d Cir. 1994), reversed and remanded the case for further proceedings. However, the panel recommended that the case be heard in banc so that the full court could reconsider *Princeton Gamma-Tech.* Having granted rehearing in banc, we will now overrule that portion of *Princeton Gamma-Tech* on which plaintiffs rely and affirm the district court's dismissal of plaintiffs' suit for lack of subject matter Jurisdiction.

Appendix A

I.

A chemical manufacturing facility operated on the Drake Chemical site from the 1940s to 1982, leaving soils and sludges, chemical storage tanks and wastewater lagoons highly contaminated with a variety of toxic contaminants considered hazardous to human health and the environment. In 1982, EPA took over the site and instituted clean-up efforts pursuant to its response authority under CERCLA. In 1988, EPA decided, after notice and an opportunity for public comment, to remediate the site by excavating the contaminated soils, treating them with an on-site mobile incinerator, and placing the treated soils back onto the site. The incineration contract was awarded in September 1993.

The first step in the implementation of the incineration remedy involves a "trial burn" in which site soils are fed into the incinerator and data is gathered to (1) verify that the incinerator will meet performance standards, (2) determine appropriate operating requirements, and (3) evaluate the potential risks from operation of the incinerator and determine whether the remedy should proceed. Prior to conducting the trial burn at the Drake site, EPA agreed, at the request of the public, to conduct a risk assessment to determine the potential health risks from the trial burn itself. It released the risk assessments to the public, held a public meeting, responded to written comments concerning the assessments, and then, in January 1996, instructed the contractor to proceed with the trial burn.

On February 1, 1996, the Commissioners and AIR filed a complaint under 42 U.S.C. § 9659, the citizen suit provision of CERCLA, seeking to enjoin the trial burn and incineration remedy from proceeding. Plaintiffs alleged that the planned

incineration (both the trial burn and the full incineration project) would result in the emission into the air of dangerous amounts of highly toxic chemicals that would contaminate the local air, soil, and food chain, creating an unacceptable risk of cancer and other serious illnesses. The complaint alleged in five counts that the incineration would violate the hazardous waste disposal requirements of the Resource Conservation and Recovery Act (RCRA), EPA's mandate under CERCLA to protect public health and the environment, and certain requirements imposed by the National Environmental Policy Act (NEPA).

The district court ordered EPA to keep the incinerator shut down until a decision could be reached on plaintiffs' motion for a preliminary injunction. Early in March, as the district court was conducting an evidentiary hearing on the motion, EPA apparently admitted that there were some problems with its health risk assessment, sought a continuance of the hearing until it could correct those problems, and agreed to keep the incinerator shut down in the meantime. The agreement was memorialized in a Consent Order.

Before the resumption of the preliminary injunction hearing but after the jurisdictional issue had been briefed by the parties, the district court dismissed plaintiffs' complaint for lack of subject matter jurisdiction. The court held that (1) CERCLA's "timing of review" provision precluded the court from exercising jurisdiction over a citizens' suit challenging an EPA remedial action prior to the completion of the action and (2) that the citizen suit provision of CERCLA was the exclusive remedy available to plaintiffs and precluded the court from predicating jurisdiction on RCRA or NEPA. Plaintiffs filed a motion for reconsideration. The district court denied the motion, rejecting the plaintiffs' contentions that (1) the court had independent jurisdiction to

review the EPA actions at the Drake site because those actions were clearly in excess of EPA's authority and (2) dismissal of the complaint violated plaintiffs' constitutional right of access to the courts. Plaintiffs timely appealed the district court's decisions.

II.

Because federal courts are courts of limited jurisdiction, a plaintiff may invoke the jurisdiction of a federal court only pursuant to a statutory grant of authority to adjudicate the asserted claim. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *In re Morrissey*, 717 F.2d 100, 102 (3d Cir. 1983). Moreover, when the plaintiff seeks to sue the United States or an instrumentality thereof, he may not rely on the general federal question jurisdiction of 28 U.S.C. § 1331, but must identify a specific statutory provision that waives the government's sovereign immunity from suit. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941). A waiver of immunity must be "unequivocally expressed," *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)), and is "construed strictly in favor of the sovereign." *Id.* (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951))

Plaintiffs here argue that there are four grounds for the district court's exercising subject matter jurisdiction over their complaint: (1) 42 U.S.C. § 9659 confers jurisdiction, despite 42 U.S.C. § 9613(h), because the complaint makes *bona fide* allegations of irreparable harm to public health or the environment; (2) if 42 U.S.C. § 9613(h) precludes the court from exercising jurisdiction, it must be set aside when irreparable harm is alleged in order to effectuate plaintiffs' constitutional

right of access to the courts at a meaningful time; (3) the citizen suit provision of RCRA confers jurisdiction; and (4) the district court had jurisdiction to review EPA's actions in remediating the Drake Chemical site under *Leedom v. Kyne*, 358 U.S. 184 (1958), because the challenged actions are in excess of EPA's authority. We hold that none of these alternatives affords the district court subject matter jurisdiction over plaintiffs' suit.

A.

Plaintiffs point first to the citizen suit provision of CERCLA as the source of the district court's subject matter jurisdiction over their claims against EPA. Section 9659(a)(2) of CERCLA, as amended, provides:

> Except as provided in subsections (d) and (e) of this section [relating to notice] and in section 9613(h) of this title (relating to timing of judicial review), any person may commence a civil action on his own behalf — . . .
>
> (2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter . . . which is not discretionary with the President or such officer.

42 U.S.C. § 9659(a)(2). According to its terms, the scope of the

cause of action authorized by the section is limited by § 9613(h), "relating to timing of judicial review," which provides, in part:

> No Federal court shall have Jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, . . . in any action except one of the following: . . .
>
> (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action *taken* under section 9604 of this title or *secured* under section 9606 of this title *was* in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

42 U.S.C. § 9613(h)(4) (emphasis added).

The district court held that Congress's description of § 9613(h) as "relating to timing of judicial review" and its use of the past tense in § 9613(h)(4) indicate that Congress intended to authorize federal court challenges to remedial action under CERCLA's response provision only *after* the remedial action has been completed. Accordingly, the court found that because plaintiffs' complaint was filed well before the completion of EPA's remedial action at the Drake Chemical site, § 9613(h)(4) expressly deprived the court of jurisdiction to entertain the portion of plaintiffs' complaint alleging that EPA violated CERCLA's requirements for selection and implementation of cleanup remedies.

Appendix A

Plaintiffs argue on appeal that the district court erred in failing to recognize an exception to § 9613(h)(4) when a citizens' suit is grounded in *bona fide* allegations of irreparable harm to public health or the environment. *See United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138, 148-49 (3d Cir. 1994). Based on our independent review of the text of § 9613(h)(4), its legislative history and the caselaw interpreting it, we agree with the district court and hold that Congress intended to preclude *all* citizens' suits against EPA remedial actions under CERCLA until such actions are complete, regardless of the harm that the actions might allegedly cause.

We begin, as we must when interpreting a statutory provision, with the plain language of the statute. *See New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1498 (3d Cir. 1996); *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907, 909 (3d Cir. 1990). Section 9613(h)(4) expressly states that the citizen suit exception to the preclusion of federal court jurisdiction over challenges to EPA removal or remedial actions applies only to review of actions that have been "taken." Given that the subsection specifically deals with the "*timing* of review," we find Congress's use of the past tense significant, and a clear indication of its intention that citizen-initiated review of EPA removal or remedial actions take place only *after* such actions are complete.

This interpretation is reinforced by the fact that the opening sentence of § 9613(h), which establishes the general preclusion of federal court jurisdiction, prohibits review of any challenge to a remedial action "selected" under § 9604, while the exception allows for review in citizens' suits alleging that actions "taken" under § 9604 were in violation of CERCLA. Because the exception is presumably more narrow than the prohibition, a

remedial action "taken" must be something other than a remedial action "selected." We think that the most reasonable distinction between the two terms is that a remedial action "selected," which federal courts have no jurisdiction to review, is one chosen but not fully implemented, while a remedial action "taken," which a federal court may review for compliance with the requirements of CERCLA, is one that was chosen *and* has been completed.

We also find the last sentence of 9613(h)(4) supportive of our interpretation of the statute. According to that sentence, "an action may not be brought with regard to a removal where a remedial action *is to be undertaken* at the site." 42 U.S.C. § 9613(h)(4) (emphasis added). A "removal" action is an action taken in the short term to "prevent, minimize, or mitigate damage" to public health or the environment from the release or threatened release of a hazardous substance, 42 U.S.C. § 9601(23), while a "remedial" action involves a "permanent remedy taken instead of or in addition to removal actions" to contain a hazardous substance and minimize harm to public health and the environment. 42 U.S.C. § 9601(24). Thus, EPA may take both "removal" and "remedial" actions at the same site with respect to the same "release" of hazardous materials. The concluding sentence of § 9613(h)(4) provides that in such situations a citizens' suit challenging a "removal" action may not be brought even after completion of that removal action, so long as "remedial" action remains "to be undertaken." This provision demonstrates beyond peradventure, we believe, that Congress intended to preclude any judicial involvement in EPA removal and remedial actions until after such actions are complete.

Although our conclusion that the statutory language is clear means that we need not consult legislative history, *see Darby v.*

Cisneros, 509 U.S. 137, 147 (1993); *Dresser Indus., Inc. v. Underwriters at Lloyd's of London*, 106 F.3d 494, 497 (3d Cir. 1997), we do so and find that that history supports our conclusion that Congress enacted § 9613(h) to prevent judicial interference, however well-intentioned, from hindering EPA's efforts to promptly remediate sites that present significant danger to public health and the environment. For example, the Conference Report on the Superfund Amendments of 1986 provides that

> [i]n new section [9613(h)(4)] of the substitute, the phrase "removal or remedial action taken" is not intended to preclude judicial review until the total response action is finished *if* the response action proceeds in distinct and separate stages. Rather an action . . . would lie *following completion* of each distinct and separable phase of the cleanup. . . . Any challenge under this provision to a *completed stage* of a response action *shall not interfere with those stages of the response action which have not been completed.*

H.R. Conf. Rep. No. 99-962, at 224 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3317 (emphasis added). This language clearly indicates that Congress intended to preclude judicial review of response actions or portions thereof that are ongoing, i.e. "have not been completed."

Similarly, the Report of the House Committee on Energy and Commerce commented that § 9613(h) codified the established principle that "there is no right of judicial review of the Administrator's selection and implementation of response

actions until after the response action [sic] have been completed to their completion." H.R. Rep. No. 99253(I), at 81 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2863; *see also* H.R. Rep. No. 99-253(III), at 22 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3045 ("[T]he Judiciary Committee amendment reaffirms that, in the absence of a government enforcement action, judicial review of the selection of a response action should generally be postponed until after the response action is taken.").[1] Report of the House Committee on Public Works and Transportation explained the rationale for precluding all Judicial review until after completion of remedial actions:

> The purpose of [§ 9613(h)] is to ensure that there will be no delays associated with a legal challenge of the particular removal or remedial action selected under section 196041 or secured . . . under section [9606]. Without such a provision, responses to releases or threatened releases of hazardous substances could be unduly delayed, thereby exacerbating the threat of damage to human health or the environment. A person's rights to challenge the choice of removal or remedial action are preserved, however, and can be exercised . . . [through] a citizen suit

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1. The Judiciary Committee proposed an amendment that would have allowed citizens to "seek review of remedial actions (not removal actions) during construction and implementation of such actions when a specific remedial measure that has been constructed is allegedly in violation of a requirement of this Act." The provision would not have allowed a challenge to the selection of the remedy, but only to its implementation. *Id.* at 23, reprinted in 1986 U.S.C.C.A.N. at 3046. The fact that Congress did not enact the Judiciary Committees proposed amendment demonstrates its commitment to preventing *all* judicial interference with remedial actions.

> alleging that the removal or remedial action was in violation of any requirement of the Act . . . .

H.R. Rep. No. 99-253(V), at 25-26 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3148-49 (emphasis added).

Were we to adopt the plaintiffs' interpretation of § 9613(h)(4) and permit judicial review of EPA remedial actions before completion whenever a challenge includes *bona fide* allegations of irreparable harm to public health or the environment, we would undermine Congress's clearly expressed intent because we would create a situation in which response actions could be seriously delayed while EPA refutes allegations of irreparable harm which, while "*bona fide,*" may simply reflect a legitimate difference of opinion about the preferred remedy for a particular site. Congress clearly intended that such differences of opinion be communicated directly to EPA during the pre-remediation public notice and comment period, not expressed in court on the eve of the commencement of a selected remedy.[2]

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2. In *Princeton Gamma-Tech,* we noted the existence of some support in the legislative history for the plaintiffs interpretation of section 9613(h)(4). that judicial review of incomplete EPA remedial actions is permitted whenever a challenge includes *bona fide* allegations of irreparable harm to public health or the environment. 31 F.3d at 145-46. In this regard. Senator Stafford remarked:

> It is crucial, if it is at all possible, to maintain citizens' rights to challenge response actions, or final cleanup plans, before such plans are implemented even in part because otherwise the response could proceed in violation of the law and waste millions of dollars of Superfund money before a court has considered

(Cont'd)

Appendix A

The courts of appeals of the Seventh, Eighth, Ninth and Eleventh Circuits have read §§ 9613(h)(4) and 9659(a)(2) in the same way as we today read it. Each of these courts of appeals has held that these sections do not permit district courts to exercise jurisdiction over citizen suits challenging incomplete EPA remedial actions even where impending irreparable harm is alleged. *Schalk v. Reilly,* 900 F.2d 1091, 1095-96 (7th Cir. 1990); *Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology,* 999 F.2d 1212 (8th Cir. 1993); *Hanford Downwinders Coalition, Inc. v. Dowdle,* 71 F.3d 1469, 1484 (9th Cir. 1995); *Alabama v. United States Envtl. Protection Agency,* 871 F.2d 1548, 1557 (11th Cir. 1989).

The majority in *Princeton Gamma-Tech* rejected this "absolute" reading of 9613(h)(4) because it found that a complete prohibition of judicial review of citizens' suits that allege irreparable harm to public health and the environment was "contrary to the objectives of CERCLA," 31 F.3d at 148, and "ma[de] the citizens' suit provision an absurdity," *Id.* We are less convinced than was the *Princeton Gamma-Tech* majority, however, that the absolute limitation on judicial review established by § 9614(h)(4) is either absurd or "contrary to the objectives of CERCLA." First, EPA removal and remedial

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> the illegality. . . . [C]itizens asserting a true public health or environmental interest in the response cannot obtain adequate relief if an inadequate cleanup is allowed to proceed. . . .

132 Cong. Rec. 28.409. Similar statements by Rep. Roe. Senator Mitchell, and Rep. Florio can also be found in the Congressional record. *See id.* at 29.754; 28.429 and 29.741. Notwithstanding these conflicting views, Congress weighed public policy and chose the elaborate pre-remediation public review and comment procedures over judicial review.

actions are designed to deal with situations involving grave and immediate danger to the public welfare. As we have noted, Congress apparently concluded that delays caused by citizen suit challenges posed a greater risk to the public welfare than the risk of EPA error in the selection of methods of remediation. Second, while Congress limited *judicial* review through § 9613(h), it did not thereby exclude the public from playing a role in ensuring that EPA actions under CERCLA are consistent with the objectives of the statute. Instead, Congress made the policy choice to substitute elaborate *pre-remediation* public review and comment procedures, *see, e.g.*, 42 U.S.C. 9617; 40 C.F.R. pt. 300, for judicial review. In addition, it gave the states, as representatives of the public, a significant role in the enforcement, in federal court, of the substantive standards established for remedial actions. *See* 42 U.S.C. § 9621(e)(2). Finally, Congress apparently left citizens the option of obtaining relief in state court nuisance actions. *See* H.R. Conf. Rep. No. 99-962, at 224 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3317 ("New section [9613(h)] is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances, pollutants, or contaminants."). Finally, even if we perceived an arguable tension between our reading and the objectives of CERCLA, our conclusion would not be altered. When statutory language is as clear as it is here, "it is simply not [the] function [of] a reviewing court to act as a superlegislature and second-guess the policy choices that Congress made." *Princeton Gamma-Tech*, 31 F.3d at 153 (Nygaard, J., concurring).

Because we find that the plain language and legislative history of 9613(h)(4) compel the conclusion that Congress intended to prohibit federal courts from exercising subject matter

jurisdiction over *all* citizens' suits challenging incomplete EPA remedial actions under CERCLA, we will overrule that portion of *Princeton Gamma-Tech* which held that a district court has jurisdiction under § 9613(h)(4) during the pendency of an EPA remedial action when plaintiffs make *bona fide* allegations of irreparable harm. Accordingly, we hold that the district court lacked subject matter jurisdiction under CERCLA's citizen suit provision to entertain plaintiffs' challenge to EPA's implementation of the incineration remedy selected for the Drake Chemical site.

B.

Plaintiffs next contend that if § 9613(h)(4) precludes the district court from exercising jurisdiction over their suit, then the provision constitutes, in the circumstances present here, an unconstitutional impediment to their right of access to the courts at a meaningful time. Plaintiffs characterize the issue presented by their constitutional argument as "whether the Constitution provides for judicial review of agency actions that threaten to take the very lives of Plaintiffs at a time when such harm may still be prevented (a meaningful time), notwithstanding statutory limitations on judicial review such as those in 42 U.S.C. § 9613(h)." Appellant's Brief at 27. Plaintiffs argue that the Constitution requires such review when there has been a "considerable showing of threatened irreparable harm and illegality," because at that point "there is no legitimate government interest in protecting the illegal and dangerous agency conduct from judicial action." *Id.* at 28-29.

We find plaintiffs' constitutional argument unpersuasive because it is inconsistent with established principles of sovereign immunity. Because EPA is an instrumentality of the federal

government, it is entitled to sovereign immunity from suit. That being the case, Congress is absolutely free to limit the extent to which it consents to suit against the EPA. *See, e.g., Maricopa County, Ariz. v. Valley Nat'l Bank of Phoenix*, 318 U.S. 357, 362 (1943) ("[T]he power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations."); *Lynch v. United States*, 292 U.S. 571, 581 (1934) ("[C]onsent to sue the United States is a privilege accorded, not the grant of a property interest protected by the Fifth Amendment. The consent may be withdrawn . . . ."); *Heller v. United States*, 776 F.2d 92, 98 (3d Cir. 1985) ("Congress' power to remove a right to sue the government is absolute. . . . Thus, statutes either denying or withdrawing judicial remedies against the United States in respect to claims against it are constitutional.") (internal quotations and citations omitted); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 245 (3d Cir. 1980) ("Congress can, of course, limit the subject matter jurisdiction of the federal courts, and can relegate some matters to the exclusive jurisdiction of an administrative agency. It can also prohibit private enforcement of federal statutes."). Under this well-recognized principle of sovereign immunity, plaintiffs cannot claim that they have a constitutional right to sue EPA in federal district court simply because they allege that an incineration remedy to be taken by EPA may cause irreparable harm. Thus, we hold that plaintiffs are not excused from the jurisdictional limitations imposed by § 9613(h)(4) by a constitutional right of access to the court.

C.

Plaintiffs further argue that the district court has jurisdiction under the citizen suit provision of RCRA to hear their claims that the Drake Chemical site remedial activity will violate the

hazardous waste treatment and disposal standards of RCRA. RCRA's citizen suit provision provides:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf — . . .
>
> (1)(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any . . . past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B). Plaintiffs asserted three claims under this provision, alleging that the Drake Chemical site incineration remedy was inconsistent with RCRA's disposal requirements and posed an "imminent and substantial endangerment" to public health and the environment.[3] The district court held that it was precluded from entertaining plaintiffs' RCRA claims by § 9613(h), which deprives the federal courts of jurisdiction "to review *any* challenges to removal or remedial action selected

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3. Plaintiffs also alleged that the Drake Chemical site remediation activities violated NEPA and that the district court had jurisdiction over the NEPA claims under 28 U.S.C. § 1331. They do not challenge on appeal the district court's conclusion that it lacked jurisdiction over the NEPA claims.

under section 9604." 42 U.S.C. § 9613(h) (emphasis added). Because the court found that the RCRA claims were brought to stop a remedial action selected under section 9604, it held that the claims constituted a challenge to a CERCLA action that could only be brought under one of the exceptions to § 9613(h). Since the court had already held that the only asserted exception, § 9613(h)(4), was inapplicable, it dismissed the RCRA claims for lack of jurisdiction.

In reaching its decision, the district court relied on *Boarhead Corp. v. Erickson*, in which we held that the district court lacked subject matter jurisdiction over plaintiff's suit under the National Historic Preservation Act (NHPA) to stay EPA's CERCLA-related pre-cleanup activities on its historic farm. 923 F.2d 1011, 1013-14 (3d Cir. 1991). We found that the plain language of § 9613(h) precluded the exercise of jurisdiction over a challenge to an ongoing CERCLA removal or remedial action under *any* federal law:

> Congress could hardly have chosen clearer language to express its intent generally to deprive the district court of jurisdiction over claims based on other statutes when the EPA undertakes the clean-up of toxic wastes at a Superfund site. The sections begins: "No Federal court shall have jurisdiction under Federal law. . . ." No language could be plainer.

Id. at 1020; *see also id.* at 1023 ("CERCLA's timing of review procedures, as established in § [9613(h)], clearly preclude jurisdiction to delay or interfere with EPA clean-up activities even if those activities could irreparably harm the archaeological

or historical resources on Boarhead Farm."). Plaintiffs argue that *Boarhead Corp.* does not govern this case because it did not involve a RCRA suit. They urge this court to adopt the rationale of *United States v. Colorado,* 990 F.2d 1565 (10th Cir. 1993), which they argue permits the prosecution of their RCRA claims despite the pendency of EPA's CERCLA remedial action.

Plaintiffs are correct that the precise holding of *Boarhead Corp.* was that the district court lacked jurisdiction to entertain a suit challenging CERCLA clean-up activities as inconsistent with the requirements imposed by NHPA, not RCRA. However, it is clear that the court's decision turned not on a finding that § 9613(h) specifically precluded *NHPA* suits, but on its conclusion that § 9613(h) precludes the federal courts from exercising jurisdiction over *any* challenge to a CERCLA action based on a violation of *any* other federal law:

> [O]ur resolution of this appeal depends upon the inability of the district court to entertain an action under the Preservation Act because § [9613(h)] of CERCLA deprives it of the power to hear claims under the Preservation Act, *or any other statute,* that would interfere with EPA's clean-up activities on a Superfund site.

923 F.2d at 1024 (emphasis added); *see also id.* at 1013-14 ("The plain language of CERCLA § [9613(h)] shows that Congress intended to deny the district courts jurisdiction to hear complaints challenging the EPA's Superfund clean-up or pre-clean-up activities, even if *a statute other then CERCLA* ordinarily would create a federal claim.") (emphasis added). Thus, even though *Boarhead Corp.* did not precisely address

the question at issue here, its reasoning is clearly applicable.[4] Indeed, the case has been relied on by other courts of appeals to support the conclusion that RCRA-based suits challenging CERCLA activities are precluded under § 9613(h). *See, e.g., McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995); *Arkansas Peace Center v. Arkansas Dep't of Pollution Control & Ecology*, 999 F.2d 1212, 1217 (8th Cir. 1993). Accordingly, the district court is precluded under 9613(h) from exercising subject matter jurisdiction over plaintiffs' RCRA claims.[5]

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4. Our conclusion that the reasoning of *Boarhead Corp.* applies to RCRA suits challenging CERCLA clean-up activities is buttressed by RCRA § 6972(b)(2)(B), which provides:

> No action may be commenced under subsection (a)(l)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment — . . .
>
> (ii) is actually engaging in a removal action under section [9604] of [CERCLA]. . . .

This provision indicates that Congress intended to preclude interference with CERCLA cleanup activities by actions predicated on RCRA violations. Although plaintiffs argue that the provision is not directly applicable here because the hazard they allege is the trial burn/incineration itself, not the hazardous waste disposal that prompted the Superfund action, the provision is still relevant as an indication of Congress's intent that RCRA actions not interfere with CERCLA remediations.

5. Even if we did not kind *Boarhead Corp.* controlling and looked to the case law of other circuits. *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), would not support the plaintiffs' position. The *Colorado* case involved efforts by the Colorado Department of Health to enforce the

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D.

Finally, plaintiffs contend that even if the district court lacks jurisdiction over their suit under both CERCLA and RCRA, it has inherent jurisdiction to review EPA's action at the Drake Chemical site under the doctrine of *Leedom v. Kyne*, 358 U.S. 184 (1958). Plaintiffs characterize that doctrine as authorizing judicial review of any agency action allegedly conducted in excess of agency authority or in violation of a clear statutory prohibition. In *Kyne*, a professional association petitioned the National Labor Relations Board (NLRB) for certification as the exclusive collective bargaining agent of nonsupervisory professional employees at a plant. A competing labor organization sought to intervene and include certain technical employees in the bargaining unit. The NLRB found that the

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state's EPA-authorized RCRA equivalent, the Colorado Hazardous Waste Management Act (CHWMA), in connection with a hazardous waste treatment and disposal facility at which EPA and the Army were conducting a CERCLA remediation. In holding that the district court had jurisdiction to enforce Colorado's CHWMA, the Tenth Circuit acknowledged that § 9613(h) bars federal courts from exercising jurisdiction over a challenge to a CERCLA remedial action under any federal law. *Id.* at 1577. However, the court held that 9613(h) does *not* bar jurisdiction over a suit to enforce RCRA regulations where the suit does not "challenge" the CERCLA remedy. In the case before it, the court found that Colorado's enforcement action was not a "challenge" to EPA/Army's CERCLA remedy because it did not seek to halt or delay the remedy, but merely to compel the Army to comply with CHWMA regulations during the course of the remediation. *Id.* at 1576. The court explicitly distinguished *Boarhead Corp.* on the ground, *inter alia*, that the *Boarhead* plaintiff, who sought to stay a CERCLA remedial action, clearly was "challenging" the CERCLA action. *Id.* at 1577. Likewise, plaintiffs here, who seek an order that EPA "immediately and permanently cease incineration at the Drake Chemical NPL site." App. at 17, clearly are "challenging" EPA's CERCLA remedial action at the Drake Chemical site.

technical employees were not professional employees, but nonetheless decided that nine of them should be included in the bargaining unit. The association asked the NLRB to take a vote of the professional employees pursuant to § 9(b)(1) of the National Labor Relations Act (NLRA). That section provides that the NLRB "shall not . . . decide that any unit is appropriate for [collective bargaining] purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." 29 U.S.C. § 159(b)(1). The NLRB refused to hold the vote, included the nonprofessional employees in the bargaining unit, and directed a bargaining unit election.

Following the election and certification of a bargaining representative, the association filed suit to have the decision, election, and certification vacated on the ground that the NLRB's decision to include the nonprofessional employees was made in excess of its authority. The Supreme Court held that the district court had jurisdiction to entertain the suit. Even though the decision to certify the unit was not a "final order" ordinarily reviewable under the NLRA, the Court allowed the suit to proceed because the suit sought vacatur of an order made in excess of the NLRB's authority and contrary to a specific "clear and mandatory" prohibition in the NLRA. *Id.* at 188. The Court inferred from Congress's creation of an express statutory "right" of professional employees not to be included in a bargaining unit with nonprofessional employees without their consent that Congress intended the right to be enforceable under the general jurisdiction of the district courts. *Id.* at 190.

Subsequent cases have refined the *Kyne* doctrine. In *Briscoe v. Bell*, 432 U.S. 404 (1977), the Court held that jurisdiction to review agency action allegedly in excess of statutory authority

cannot be inferred when language in the statute itself expressly forecloses judicial review. In *Briscoe,* Texas sued the United States Attorney General to challenge his determination that Texas was covered by the Voting Rights Act (VRA). The Supreme Court held that the district court lacked jurisdiction to address Texas's challenge to the Attorney General's determination. Although Texas alleged that the Attorney General had exceeded his authority in calculating the applicability of the VRA, the Court held that review of the determination was expressly precluded by § 4(b) of the VRA, which provides that "a determination or certification of the Attorney General or of the Director of the Census under this section . . . shall not be reviewable in any court . . . ." 42 U.S.C. § 1973b(b). The Court found that complete preclusion of review was consistent with Congress's intention to "eradicate the blight of voting discrimination with all possible speed" by preventing judicial delays in implementation of the VRA. 432 U.S. at 410.

More recently, in *Board of Governors v. MCorp Financial, Inc.*, 502 U.S. 32 (1991), the Court reiterated that a right to judicial review under *Kyne* may be inferred only if there is no clear statutory prohibition of such review. In *MCorp,* a bank holding company sought to enjoin administrative proceedings instituted against it by the Federal Reserve Board on the ground that the proceedings were in excess of the Board's authority. The Federal Institutions Supervisory Act (FISA) authorizes the Board to institute administrative proceedings against bank holding companies. Although FISA includes a comprehensive regime of judicial review of Board orders, it also provides that "except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice

or order." 12 U.S.C. § 1818(i)(1). The Court recognized that "*Kyne* stands for the familiar proposition that 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review,' " 502 U.S. at 44 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). It nevertheless found in FISA the "clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review and enjoin the Board's ongoing administrative proceeding." *Id.* Thus, the district court had no jurisdiction to entertain the holding company's suit.

Section 9613(h) provides "clear and convincing evidence," akin to that present in *MCorp*, that Congress intended to deny the district court jurisdiction to review EPA's ongoing remedial action. Such denial of judicial review is consistent with Congress's intention to permit EPA to eradicate environmental damage "with all possible speed" by preventing judicial delays in the implementation of remedial actions. *See Briscoe*, 432 U.S. at 410. Accordingly, we hold that the *Kyne* doctrine does not confer federal court jurisdiction over plaintiffs' suit.

III.

In accordance with the foregoing, we conclude that the district court lacked subject matter jurisdiction over plaintiffs' suit to stop the Drake Chemical site incineration remedy, and we will affirm the dismissal of the complaint.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA FILED SEPTEMBER 30, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 4:CV-96-0181

Complaint Filed 2/1/96
(Judge Muir)

CLINTON COUNTY COMMISSIONERS, and A.I.R., INC.,

Plaintiffs

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants

ORDER
September 30, 1996

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On February 1, 1996, the Clinton County Commissioners and Arrest the Incinerator Remedy, Inc., filed a complaint in this Court seeking to enjoin the United States Environmental Protection Agency ("EPA") from conducting a test burn at a site targeted for clean-up by the EPA. On August 14, 1996, we issued an order in which we granted the EPA's motion to dismiss the Plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction.

Appendix B

On August 28, 1996, the Plaintiffs filed a motion for reconsideration of our order dated August 14, 1996, and a brief in support thereof. On September 12, 1996, the EPA filed a brief in opposition. On September 25, 1996, the Plaintiffs filed a reply brief and the motion for reconsideration became ripe for disposition.

On September 26, 1996, the Plaintiffs filed a motion for expedited consideration of their motion for reconsideration and a brief in support thereof. The EPA does not concur in the Plaintiffs' motion for expedited consideration. In their motion for expedited consideration, the Plaintiffs request an accelerated decision from this Court regarding the Plaintiffs' motion for reconsideration because the EPA intends to start its test burn on October 1, 1996. The motion has merit and we will grant it. Our disposition of the Plaintiffs' motion for reconsideration follows.

A motion for reconsideration is a device of limited utility. It may be used only to seek remediation of manifest errors of law or fact, or to present newly discovered evidence which, if discovered previously, might have affected the Court's decision. Harasco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). A motion for reconsideration must rely on at least one of three grounds: (1) an intervening change in controlling law; (2) the availability of evidence not previously available; or (3) the need to correct a clear error of law or prevent manifest injustice in compliance with Fed.R.Civ.P. 59(e). McDowell Oil Service v. Interstate Fire & Casualty, 817 F. Supp. 538, 541 (M.D. Pa. 1993) (McClure, J.). In *McDowell,* the Court stated that a motion for reconsideration ". . . is not to be used as a means 'to reargue matters already argued and disposed of' by prior rulings 'or to put forward additional arguments which it could have made but neglected to make before judgment.' " *McDowell,* 817 F.Supp. at 541 (citations omitted).

Appendix B

In support of their motion for reconsideration, the Plaintiffs first argue that if, as we held in our order of August 14, 1996, 42 U.S.C. §9613(h)(4) bars their right to redress in a federal district court, that section would be in violation of the Plaintiffs' constitutional right to access to the Courts at a meaningful time. The actions by the EPA which are challenged by the Plaintiffs in this case, however, are akin to rulemaking as opposed to adjudication in that the actions are prospective and do not exceptionally affect "a small number of people . . . in each case upon individual grounds." United States vs. Florida East Coast Railway Co., 410 U.S. 224, 245 (1973); Neighborhood Toxic Cleanup Emergency v. Reilly, 716 F. Supp. 828 (D.N.J. 1989) (Brotman, J.). Because the EPA's actions in this case most closely resemble rulemaking, and are therefore legislative in nature, the Plaintiffs do not have a right to be heard in a federal district court on this issue, particularly because Congress has expressly withheld jurisdiction from district courts on the issue. *Neighborhood Toxic Cleanup Emergency,* 716 F. Supp. at 835. The Plaintiffs' argument that 42 U.S.C. §9613(h)(4) deprives them of a right to access to the Courts at a meaningful time is therefore without merit.

The Plaintiffs next argue that the case of *Leedom v. Kyne,* 358 U.S. 154 (1958), affords this Court subject matter jurisdiction over this case. In *Leedom,* the United States Supreme Court held that district courts always retain jurisdiction to review allegedly lawless actions by agencies of the Government. The *Leedom* doctrine "is not automatically invoked whenever a challenge to the scope of an agency's authority is raised," but instead "is a narrow anomaly reserved for extreme situations." Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1093 (6th Cir. 1981). Furthermore, where Congress precludes subject matter jurisdiction by federal courts over an issue, the *Leedom* doctrine

is inapplicable. *See* Briscoe v. Bell, 432 U.S. 404, 413-14 (1977). The Plaintiffs' argument that *Leedom* confers jurisdiction upon this Court is therefore without merit.

The Plaintiffs further argue that we erred in applying the case of *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991), for the proposition that the Plaintiffs' claims under the Resource Conservation and Recovery Act were barred and that this Court erred in finding that certain portions of *United States vs. Princeton Gamma-Tech. Inc.*, 31 F.3d 138 (3d Cir. 1994), are dicta. In making these arguments, the Plaintiffs merely restate arguments which they set forth in their brief in opposition to the EPA's motion to dismiss and which we rejected in our order of August 14, 1996. This restatement of arguments already considered by the Court is improper. *McDowell Oil Service*, 817 F. Supp. at 541.

The Plaintiffs do not present either an intervening change in the controlling law or new evidence not previously available as grounds for their motion for reconsideration. We have thoroughly reviewed our order of August 14, 1996, and we are convinced that we did not make an error of law. Consequently, we will deny the Plaintiffs' motion for reconsideration.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Plaintiffs' motion for expedited consideration filed September 26, 1996, is granted.

2. The Plaintiffs' motion for reconsideration filed August 28, 1996, is denied.

3. The Clerk shall forthwith transmit a copy of this order

by FAX to the offices of those counsel who may be so reached, shall read the dispositive provisions to other counsel over the telephone, and shall mail a copy to each counsel.

s/ Muir
MUIR, U.S. District Judge

MM: jt

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA FILED AUGUST 14, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 4:CV-96-0181

Complaint Filed 2/1/96
(Judge Muir)

CLINTON COUNTY COMMISSIONERS, AND A.I.R., INC.,

Plaintiffs

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants

ORDER

August 14, 1996

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On February 1, 1996, the Clinton County Commissioners and Arrest the Incinerator Remedy, Inc., filed a complaint in this Court seeking to enjoin the United States Environmental Protection Agency ("EPA") from conducting a test burn at a site targeted for clean-up by the EPA.

On February 20, 1996, the EPA filed a motion to dismiss

the Plaintiffs' complaint pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. On February 27, 1996, the EPA filed a brief in support of its motion. On March 8, 1996, we issued an order reducing to writing the parties' agreement that, among other things, briefing on the EPA's motion to dismiss would be suspended "until further notice." On June 26, 1996, we issued an order in which we directed that briefing on the EPA's motion to dismiss be resumed. In that order, we also held in abeyance the Plaintiffs' motion for consolidation of proceedings and the EPA's motion for an order governing further proceedings pending our decision on the instant motion to dismiss.

On July 10, 1996, the Plaintiffs filed a brief in opposition to the EPA's motion to dismiss. On July 24, 1996, the EPA filed a reply brief which was 18 pages in length accompanied by a motion for permission to exceed the 15-page limitation prescribed by Local Rule 7.8. Because the EPA never obtained the concurrence of Plaintiffs' counsel for its motion to exceed the 15-page limitation, on August 7, 1996, we issued an order in which we denied the EPA's motion to exceed the page limitation, struck from the record the EPA's reply brief, and allowed the EPA an additional period of time to file a reply brief which complied with the Local Rules. On August 9, 1996, the EPA filed a proper reply brief. This matter is now ripe for disposition.

Fed.R.Civ.P. 12(b)(1) requires a Court to dismiss a complaint if it lacks subject matter jurisdiction over the Plaintiffs' claims. The Plaintiffs in this case allege that subject matter jurisdiction exists under 28 U.S.C. §1331, which allows district courts to hear cases which present questions of federal law. The Plaintiffs allege that three federal statutes create the federal questions upon which their claim and our jurisdiction is based.

Appendix C

Because the Defendant in this action is an agency of the United States Government, the Plaintiffs may not predicate jurisdiction on 28 U.S.C. §1331 alone. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States vs. Mitchell, 445 U.S. 535, 538 (1980). Any waiver of sovereign immunity by the United States must be clearly and unequivocally expressed in a statute giving rise to a cause of action. United States vs. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992).

In their complaint, the Plaintiffs set forth claims under the Resource Conservation and Recovery Act, 42 U.S.C. §6972 (a); the National Environmental Policy Act, 42 U.S.C. §§4321-4370(d); and the Comprehensive Environmental Response Compensation, and Liability Act, 42 U.S.C. §9613(h)(4). The EPA argues that we lack subject matter jurisdiction over all of the Plaintiffs' claims because the United States has not waived its sovereign immunity as to any of the claims.

We will first address the Plaintiffs' claims set forth under the Resource Conservation and Recovery Act and the National Environmental Policy Act. 42 U.S.C. §9613(h) states:

> No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial actions selected under Section 9604 of this Title, . . . in any action except one of the following:
>
> * * *
>
> (4) An action under Section 9659 of this Title (relating to citizens' suits) alleging that the removal or remedial

> action taken under Section 9604 of this Title or secured under Section 9606 of this Title was in violation of any requirement of this Chapter.

In the present case, the EPA has sought to undertake a remedial action pursuant to 42 U.S.C. §9604. 42 U.S.C. §9613(h) provides the exclusive remedy for plaintiffs who challenge such EPA remedial actions. Boarhead Corp. v. Erickson, 923 F.2d 1011, 1020 (3d Cir. 1991). Plaintiffs, therefore, may not pursue such claims under any other federal statute. *Id.* We will grant the EPA's motion to dismiss the Plaintiffs' claims brought under the Resource Conservation and Recovery Act and the National Environmental Policy Act.

We will now address the Plaintiffs' claim brought under the Comprehensive Environmental Response Compensation, and Liability Act, 42 U.S.C. §9613(h)(4). Section 9613(h)(4) authorizes citizens to bring "an action . . . alleging that the . . . remedial action taken under Section 9604 of this title . . . was in violation of any requirement of [the Comprehensive Environmental Response Compensation, and Liability Act]." This provision solely authorizes litigation concerning EPA remedial actions "taken" by the EPA which "violated" other provisions of law. Congress's use of the past tense in drafting 42 U.S.C. §9613 is indicative of a legislative intent to allow litigation solely after the EPA has completed a remedial action. Arkansas Peace Center v. Arkansas Center of Pollution Control and Ecology, 999 F.2d 1212 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1397 (1994); Alabama v. EPA, 911 F.2d 499 (11th Cir. 1990); Schalk v. Reilly, 900 F.2d 1091 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990). We are therefore of the view that 42 U.S.C. §9613 expressly withholds jurisdiction from district courts to

hear a citizens' suit challenging an EPA remedial action until after the remedial action has been completed by the EPA.

In their brief in opposition, the Plaintiffs rely upon the case of *United States v. Princeton Gamma-Tech Inc.*, 31 F.3d 138 (3d Cir. 1994) for the proposition that a citizens' suit may be brought prior to the EPA's completion of a remedial action. In *Princeton*, the United States Court of Appeals for the Third Circuit held that "where a bona fide allegation of irreparable injury to public health or the environment is made, injunctive relief is available *in a cost recovery action under 42 U.S.C. §9613(h)(1)*" prior to the completion of the EPA's remedial action. *Id.* at 149 (emphasis added).

In that case, the Court suggested by way of dicta that a citizens' suit under 42 U.S.C. §9613(h)(4) may be brought prior to the completion of the EPA's remedy where a plaintiff presents bona fide allegations that the EPA's actions would cause irreparable harm to public health or the environment. We are of the view that the U.S. Court of Appeals for the Third Circuit may well reach a different result if directly faced with the question of whether citizens' suits may be heard by district courts prior to the completion of the EPA's remedial action given the statutory language of section 9613(h)(4) barring litigation prior to the completion of a remedy chosen by the EPA. Consequently, we will follow the holdings of *Arkansas Peace Center, Alabama,* and *Schalk,* in which other Courts of Appeals directly addressed the question here presented.

In the present case, the EPA has merely proposed to conduct a test burn at a site targeted for clean-up, the purpose of which is to gather data on the safety and propriety of incineration as a remedy for the clean-up of the site. The EPA clearly has not

completed a remedial action upon which a cause of action may be based pursuant to 42 U.S.C. §9613(h)(4). Consequently, we will grant the EPA's motion to dismiss the Plaintiffs' claims brought under the Comprehensive Environmental Response, Compensation, and Liability Act.

Because we find that we lack subject matter jurisdiction over the Plaintiffs' claims, we will grant the EPA's motion to dismiss the Plaintiffs' complaint pursuant to Fed.R.Civ.P. 12(b)(1). We will also deny as moot three procedural motions which are presently pending in this case.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The EPA's motion to dismiss the Plaintiffs' complaint pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction filed February 20, 1996, is granted.

2. The Plaintiffs' motion for consolidation of proceedings filed May 1, 1996, is denied as moot.

3. The EPA's motion for an order governing further proceedings filed May 16, 1996, is denied as moot.

4. The Plaintiffs' motion filed July 26, 1996, and revised July 29, 1996, to amend our order of April 16, 1996, is denied as moot.

5. The Clerk of Court shall close the file in this case.

s/ Muir
MUIR, U.S. District Judge

MM: jt

APPENDIX D — RELEVANT STATUTES

TITLE 42 – THE PUBLIC HEALTH AND WELFARE
CHAPTER 82 – SOLID WASTE DISPOSAL
SUBCHAPTER VI – FEDERAL RESPONSIBILITIES

6961. Application of Federal, State, and local law to Federal facilities

(a) In general

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any sold waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, state, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief,

administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). The reasonable service charges referred to in this subsection include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local solid or hazardous waste law with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period

not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

6972. Citizen suits

(a) In general.

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf.

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter, or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section —

(A) prior to days after the plaintiff has given notice of the violation to (i) the Administrator; (ii) the State in which the alleged violation occurs; and (iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order, except that such action may be brought immediately after such notification in the case of an action under this section

respecting a violation of subchapter III of this chapter; or

(B) if the administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order. In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

2(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to (i) the Administrator; (ii) the State in which the alleged endangerment may occur; (iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment —

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and

Liability Act of 1980 (42 U.S.C. 9606), (FOOTNOTE 1) So in original. The comma probably should be a semicolon.

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9604);

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9604) and is diligently proceeding with a remedial action under that Act (42 U.S.C. 9601 et seq.); or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 (FOOTNOTE 2) (42 U.S.C. 9606) or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action. (FOOTNOTE 2) So in original. Probably should be "1980". In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment — (i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9604); or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9604) and is diligently proceeding with a remedial action under that Act (42 U.S.C. 9601 et seq.).

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs

(d) Intervention In any action under this section the Administrator, if not a party, may intervene as a matter of right

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency)

(2)

Supreme Court, U.S.
FILED
NOV 26 1997
CLERK

No. 97-541

In the Supreme Court of the United States

OCTOBER TERM, 1997

ARREST THE INCINERATOR REMEDIATION (A.I.R.), INC.,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9613(h), precludes federal court jurisdiction over an environmental citizen suit that challenges ongoing government cleanup actions at a CERCLA site.

2. Whether this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), provides federal court jurisdiction over a challenge to ongoing government cleanup actions at a CERCLA site.

3. Whether the denial of jurisdiction over challenges to ongoing government cleanup actions at a CERCLA site violates due process or any constitutional right of access to the courts.

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In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The unanimous opinion of the en banc court of appeals (Pet. App. 1a-25a) is reported at 116 F.3d 1018. The orders of the district court (Pet. App. 26a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1997. The petition for a writ of certiorari was filed on September 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This litigation arises from the United States Environmental Protection Agency's (EPA's) selection and implementation of remedial action addressing soil and sediment contamination at the Drake Chemical Superfund site in Lock Haven, Pennsylvania. After EPA conducted an initial emergency cleanup pursuant to its authority under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, it added the Drake site to the National Priorities List, a list of sites that pose the greatest threat to public health and the environment. Pet. App. 4a; see 42 U.S.C. 9605; 40 C.F.R. Pt. 300, App. B.

EPA's investigation revealed extensive soil contamination from industrial wastes, and that toxic contaminants had migrated into groundwater. EPA therefore concluded that the site soil must be decontaminated to protect human health and the environment. Gov't C.A. Br. 10-11. In August of 1988, EPA proposed to excavate the soil, to treat it on-site with a mobile incinerator, and to place the remediated soil back onto the site. *Id.* at 11; Pet. App. 4a. Following an opportunity for public comment, EPA in September of 1988 issued its Record of Decision, which selected on-site incineration of contaminated soils as a remedial action for the Drake site. Gov't C.A. Br. 11.[1]

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[1] Based on public comment, EPA found that the community was "pleased with the permanent destruction of the soil and sludges" and was "pleased that the site will possibly be available for some other use" upon completion of the selected remedial action. Gov't C.A. Br. 11 n.11.

A key step in EPA's implementation of an incineration remedy is the "trial burn" process, where the incinerator is operated for a limited period to generate essential data. Those data are, among other things, used to verify that the incinerator can meet required performance standards, and to evaluate the potential risks from operation of the incinerator. Pet. App. 4a. Although not required to do so by statute or regulation, EPA agreed to conduct an initial screening-level risk assessment to evaluate the potential human health risks from the trial burn itself. *Ibid.* EPA released the draft risk assessment to the public for comment in December 1995, held a public meeting and responded to written comments in January 1996, and then directed the contractor to proceed with the trial burn. *Ibid.*; Gov't C.A. Br. 12.

2. In February 1996, petitioner filed suit against EPA in an effort to bar it from conducting the trial burn and soil incineration remedy at the Drake site. Pet. App. 4a.[2] The complaint alleged that EPA's remedy violated CERCLA, the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Alleging that the trial burn would pose a hazard to human health and the environment, petitioner sought a preliminary injunction and a temporary restraining order. Pet. App. 5a; Gov't C.A. Br. 12.

EPA opposed the motion for a preliminary injunction and moved to dismiss the complaint for lack of subject matter jurisdiction. Gov't C.A. Br. 12-13. EPA agreed not to commence the trial burn at the

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[2] The Clinton County Commissioners also joined the suit. Pet. App. 4a. They, however, did not petition for certiorari.

site prior to the court's resolution of those motions. *Id.* at 13. After the district court held a hearing on the preliminary injunction motion, EPA in March of 1996 notified the district court that the agency had decided to delay the trial burn process and develop a new risk assessment to respond more fully to the concerns of petitioner and others. *Ibid.* In June of 1996, EPA issued, and filed with the district court, a five-volume, comprehensive risk-assessment report, which concluded that the trial burn process at the Drake site would not pose a threat to human health. *Ibid.*

In August of 1996, the district court dismissed the complaint, holding that CERCLA Section 113(h), 42 U.S.C. 9613(h), expressly precludes judicial review of petitioner's challenges to EPA's response actions at the site. Pet. App. 31a-36a. In particular, the court held that petitioner's RCRA and NEPA claims were barred by the Third Circuit's decision in *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011 (1991). Pet. App. 34a. Petitioner's claims under the CERCLA citizen suit provision, 42 U.S.C. 9659, the court held, were barred by CERCLA Section 113(h)(4). That provision, by its plain terms, allows citizen suits only *after* completion of the remedial action, the court concluded; it does not permit plaintiffs to use such suits to block EPA from implementing its remedial action in the first place. Pet. App. 33a-35a.

The district court acknowledged that its decision might not be consistent with dictum in the Third Circuit's opinion in *United States* v. *Princeton Gamma-Tech, Inc.*, 31 F.3d 138 (1994). Nonetheless, relying on the decisions of the other courts of appeals that had addressed the scope of Section 113(h) directly, the court concluded that the Third Circuit "may well

reach a different result if [or when] directly faced" with the question. Pet. App. 35a.[3]

3. After a panel of the Third Circuit urged the full court to take this case en banc to reconsider *Princeton Gamma-Tech*, the court of appeals agreed to rehear the case en banc. Pet. App. 3a. In a unanimous decision, the en banc court then affirmed the district court's dismissal of the suit for lack of subject matter jurisdiction and overruled *Princeton Gamma-Tech* in relevant part.

a. The court of appeals rejected petitioner's argument that CERCLA's citizen suit provision, 42 U.S.C. 9659, provides the district court with jurisdiction. Pet. App. 7a-16a. The court based that conclusion on CERCLA Section 113(h), 42 U.S.C. 9613(h), which states that "[n]o Federal court shall have jurisdiction under Federal law * * * to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except [in certain enumerated proceedings]." See Pet. App. 7a-16a.

The court recognized that Section 113(h)(4) provides an exception for CERCLA citizen suits, but it held that the plain language of Section 113(h)(4) allows such suits to proceed only *after* EPA has

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[3] Following the district court's dismissal of petitioner's claims, EPA commenced the trial burn process, which was completed in February 1997. EPA is using the data generated thereby to assess the potential risks of remedial operation of the incinerator. That risk assessment will undergo an external peer review evaluation and will be released for public comment. EPA will consider the results of the risk assessment, along with all comments, prior to making its final decision on whether to proceed with remedial operation of the incinerator.

completed its remedial action. Pet. App. 10a. Not only is the statutory language unmistakeably clear, the court explained, but the legislative history is as well. *Id.* at 10a-13a. The numerous courts of appeals that have addressed the scope of Section 113(h)(4)'s exception, the court continued, have come to the same conclusion, holding that citizen suits challenging EPA remedial actions can be brought only after the remedial actions are completed. *Id.* at 14a (citing decisions of the Seventh, Eighth, Ninth and Eleventh Circuits).

b. The court of appeals similarly rejected petitioner's argument that jurisdiction could be based on the citizen suit provision of RCRA, 42 U.S.C. 6972(a)(1)(B). Pet. App. 17a-21a. CERCLA Section 113(h), the court explained, by its plain terms "preclude[s] the exercise of jurisdiction over a challenge to an ongoing CERCLA removal or remedial action under *any* federal law," including RCRA. *Id.* at 19a (citing *Boarhead*, 923 F.2d 1011).

c. The court of appeals then turned to petitioner's contention that this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), provides a basis for jurisdiction. Pet. App. 22a-25a. Relying on this Court's decisions in *Briscoe* v. *Bell*, 432 U.S. 404 (1977), and *Board of Governors* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), the court of appeals concluded that the *Kyne* doctrine does not apply in this case because CERCLA Section 113(h) provides clear and convincing evidence that Congress intended to deny federal court jurisdiction to review EPA's ongoing remedial actions. Pet. App. 23a-25a.

d. Finally, the court of appeals rejected petitioner's argument that the temporary preclusion of judicial review violates petitioner's constitutional

right of access to the courts. Pet. App. 16a-17a. The court concluded that the United States has sovereign immunity, and that Congress is not constitutionally obligated to waive that immunity by providing federal courts with jurisdiction to hear petitioner's claims against EPA immediately.

ARGUMENT

Section 113(h) of CERCLA imposes a jurisdictional limit on the manner and timing of federal district court challenges to CERCLA removal and remediation actions. That Section provides in no uncertain terms that "[n]o Federal court shall have jurisdiction under Federal law * * * to review any challenges to removal or remedial action selected under section 9604 of this title," except in certain enumerated circumstances. 42 U.S.C. 9613(h). The court of appeals below—joining every circuit that has considered the issue—properly concluded that Section 113(h) bars claims, such as petitioner's, that seek to impede EPA remedial actions providing for the cleanup of hazardous substances under CERCLA. Further review, accordingly, is not warranted.

1. Petitioner appears to contend (Pet. 15, 17, 25-26) that jurisdiction can be founded on CERCLA Section 113(h)(4), 42 U.S.C. 9613(h)(4), which provides an exception to the denial of jurisdiction contained in Section 113(h). Under Section 113(h), the prohibition against federal jurisdiction does not apply to:

> (4) An action under section 9659 of this title (relating to citizen suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought

> with regard to a removal where a remedial action is to be undertaken at the site.

42 U.S.C. 9613(h)(4). By its plain terms, Subsection (4) provides jurisdiction only for CERCLA citizen suits "alleging that the removal or remedial action *taken* under section 9604 of this title or *secured* under section 9606 of this title *was* in violation of" CERCLA. *Ibid.* (emphasis added). As the court of appeals correctly ruled, the use of the past tense—allowing challenges alleging that an action *was* in violation of law—and the reference to removal or remedial action "taken" or "secured" reveal that Congress intended to allow challenges to removal or remedial actions only *after* those actions are completed. Pet. App. 9a-10a. To the extent the plain language may leave any doubt, the legislative history is, as the court of appeals also recognized (*id.* at 10a-13a), directly and specifically to the same effect.[4]

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[4] See, *e.g.*, H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 1, at 81 (1985) ("there is no right of judicial review of the Administrator's selection and implementation of response actions until after the response action[s] have been completed"); H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 224 (1986) (judicial review postponed until "all the activities set forth in the Record of Decision for the surface clean up phase have been completed"); *Alabama* v. *EPA*, 871 F.2d 1548, 1557 (11th Cir.) (citing and quoting additional portions of the legislative history), cert. denied, 493 U.S. 991 (1989). Congress chose to delay review of EPA remedial actions until after completion so as to ensure that cleanup actions would not be delayed by lawsuits. See Pet. App. 15a ("Congress apparently concluded that delays caused by citizen suit challenges posed a greater risk to the public welfare than the risk of EPA error in the selection of methods of remediation."); *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 329 (9th Cir.) ("Congress has already

Every court of appeals that has interpreted this statutory provision has reached precisely the same conclusion. See *Schalk* v. *Reilly*, 900 F.2d 1091, 1095 (7th Cir.) ("The obvious meaning of this statute is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy."), cert. denied, 498 U.S. 981 (1990); *Alabama* v. *EPA*, 871 F.2d 1548, 1557 (11th Cir.) (the "plain language of the statute indicates that section 113(h)(4) applies only after a remedial action is actually completed"), cert. denied, 493 U.S. 991 (1989); *Arkansas Peace Center* v. *Arkansas Dep't of Pollution Control and Ecology*, 999 F.2d 1212, 1216-1218 (8th Cir. 1993) (court lacks subject matter jurisdiction where remedial action has not been completed), cert. denied, 511 U.S. 1017 (1994); *McClellan Ecological Seepage Situation* v. *Perry*, 47 F.3d 325, 328, 331 (9th Cir.) (the "unqualified language" of Section 113(h) "withholds federal jurisdiction to review citizen suits * * * that challenge ongoing CERCLA clean up actions"), cert. denied, 116 S. Ct. 51 (1995). Accordingly, no further review is warranted.

2. Petitioner asserts (Pet. 15-16) that Section 113(h) does not bar this action because it was brought,

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balanced all concerns" and concluded that "the need for swift execution of CERCLA cleanup plans" outweighs the risk of irreparable harm), cert. denied, 116 S. Ct. 51 (1995). Pre-remediation public participation, Congress determined, could be accommodated through non-judicial processes. Pet. App. 14a-15a ("Congress made the policy choice to substitute elaborate *pre-remediation* public review and comment procedures for judicial review," and also "gave the states, as representatives of the public, a significant role in the enforcement, in federal court, of the substantive standards established for remedial actions") (citations omitted).

at least in part, under RCRA rather than CERCLA. But the plain language of Section 113(h) precludes federal court jurisdiction "to review *any* challenges" to CERCLA remedial actions under *any* "Federal law," including the citizen suit provisions of RCRA. Pet. App. 20a-21a (emphasis added). Once again, the courts of appeals unanimously agree. See *Arkansas Peace Center*, 999 F.2d at 1217 (Section 113(h) bars federal jurisdiction over RCRA challenge to ongoing cleanup); *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011, 1020 (3d Cir. 1991) (Section 113(h) precludes review of National Historic Preservation Act of 1966 claim challenging ongoing cleanup); *McClellan*, 47 F.3d at 328-329 ("the unqualified language of [Section 113(h)] precludes 'any challenges' to CERCLA Section 104 clean-ups"—including RCRA and Clean Water Act challenges—"not just those brought under other provisions of CERCLA"); *Schalk*, 900 F.2d at 1095, 1097 (NEPA and Administrative Procedure Act claims barred).

3. Nonetheless, petitioner argues (Pet. 14-18) that the Third Circuit's interpretation of CERCLA Section 113(h) conflicts with the decisions in *United States* v. *Colorado*, 990 F.2d 1565 (10th Cir. 1993), cert. denied, 510 U.S. 1092 (1994), and *Alabama* v. *EPA*, 871 F.2d 1548 (11th Cir.), cert. denied, 493 U.S. 991 (1989). There is no conflict.

a. The question before the Tenth Circuit in *Colorado* was a narrow one: Whether a State could, notwithstanding Section 113(h)'s bar against "challenges" to ongoing EPA cleanup actions, enforce its EPA-authorized RCRA hazardous waste standards at a federal facility where a CERCLA cleanup was being conducted. 990 F.2d at 1568-1569. Answering that question in the affirmative, the Tenth Circuit held

that Section 113(h) did not preclude the State's enforcement of its hazardous waste program because the State's action did not constitute a "challenge" to EPA's remedial action within the meaning of Section 113(h). See *id.* at 1576 (action by State to enforce hazardous waste laws is "not necessarily a challenge to the CERCLA action"). In particular, the court emphasized, the suit did not seek to halt or delay EPA's remedial action. *Id.* at 1577 (distinguishing *Boarhead* on the ground that "the plaintiff's complaint in *Boarhead* sought to stay the CERCLA remedial action; thus, the plaintiff's action * * * clearly constituted a challenge to the CERCLA remedial action").

While the United States believes that the Tenth Circuit's decision in *Colorado* is incorrect, the holding in that case has not been adopted outside the Tenth Circuit and is not implicated by this case in any event.[5] It is undisputed that petitioner here *is* attempting to delay or block EPA from proceeding with its remediation plan. Even the Tenth Circuit has held that, where a plaintiff seeks to do so, Section 113(h)'s prohibition on federal jurisdiction unquestionably applies. See *United States* v. *City and County of Denver*, 100 F.3d 1509, 1514 (10th Cir. 1996) (finding *Colorado* "clearly distinguishable" and holding that the defendant's attempt to stay EPA's response action "constitutes a challenge" barred by Section 113(h)).[6] Because the courts of appeals

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[5] The United States unsuccessfully petitioned for certiorari in *Colorado* to address whether a State could dictate hazardous substance response activities at a CERCLA site through state law. See U.S. Pet. No. 93-786. That issue of federal-state relations is not raised by the present case.

[6] *Colorado* is distinguishable for yet another reason. There, the Tenth Circuit relied at least in part on 42 U.S.C. 9614(a),

universally agree that Section 113(h) deprives federal courts of jurisdiction over citizen suits that, like petitioner's, challenge ongoing CERCLA remedial actions, no further review is warranted.[7]

b. The asserted conflict with the Eleventh Circuit's decision in *Alabama* v. *EPA*, 871 F.2d 1548, similarly does not exist. In *Alabama*, the plaintiffs sought to enjoin EPA from shipping hazardous wastes from Texas to Alabama as part of the cleanup of a Texas Superfund site. *Id.* at 1553. The court of appeals held that "Section 113(h) clearly removes this challenge from federal jurisdiction" and the exception provided by "[S]ection 113(h)(4) applies only after a remedial action is actually completed." *Id.* at 1557. While the plaintiffs contended that their action did not "challenge" EPA's remedial action, the court disagreed, eventually adding that, "[t]o the extent

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which provides that nothing in CERCLA preempts "a State from imposing * * * additional liability or requirements with respect to the release of hazardous substances within such State." See 990 F.2d at 1576. Because the court believed that barring Colorado from enforcing its hazardous waste laws would prevent Colorado from "imposing" its hazardous waste "requirements" in contravention of 42 U.S.C. 9614(a), it read Section 113(h) as allowing Colorado's enforcement action to proceed. *Ibid.* Because this case does not involve a State's efforts to "impos[e] * * * additional liability or requirements," that rationale is inapplicable.

[7] As petitioner points out (Pet. 16), *Colorado* suggests that CERCLA Section 113(h) may not prohibit citizen suits under RCRA. The Tenth Circuit, however, explicitly stated that it "need not decide this issue." 990 F.2d at 1578. The existence of stray dictum in *Colorado*—dictum that is unlikely to be followed given the contrary case law in the other circuits—does not provide a sufficient justification for further review of this case.

plaintiffs' complaint may in part be read as not challenging the remedial action plan and therefore not removed from federal jurisdiction," the claims were without merit. *Id.* at 1559.

The Eleventh Circuit's decision in *Alabama* thus is entirely consistent with the Third Circuit's decision here. The court there, like the Third Circuit here, understood that it could not entertain challenges to the remedial action. Although petitioner claims (Pet. 17-18) that the Eleventh Circuit's brief mention of the merits shows that the Eleventh Circuit *must* have had jurisdiction, the Eleventh Circuit was careful to clarify that it would address plaintiff's claims on the merits only "[t]o the extent" they could "be read as not challenging the remedial action plan." 871 F.2d at 1560. Here, petitioner can claim no basis for reading its complaint as "not challenging" the remedial action plan. To the contrary, as petitioner's name suggests, the entire purpose of its lawsuit is to "arrest the incinerator remediation" that EPA intends to use.

4. Petitioner's claim (Pet. 9-14) that the lower courts had jurisdiction under this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), is similarly without merit. In *Leedom* v. *Kyne*, this Court held that the federal courts had the power to review a National Labor Relations Board (NLRB) decision that was "in excess of [the NLRB's] delegated powers and contrary to a specific statutory prohibition," 358 U.S. at 188, notwithstanding the fact that no federal statute expressly provided for a right of judicial review.

As the court of appeals held below (Pet. App. 25a), the narrow holding of *Leedom* v. *Kyne* does not permit judicial review where there is a clear statutory

provision divesting the courts of jurisdiction. As this Court explained in *Board of Governors* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), *Leedom* v. *Kyne* stands merely "for the familiar proposition" that courts should not "restrict access to judicial review" absent "clear and convincing evidence that Congress" intended for them to do so. *Id.* at 44. Where, as here, the language and history of a federal statute provides "clear and convincing evidence that Congress intended to deny" federal courts "jurisdiction to review and enjoin" ongoing agency action,[8] judicial review is unavailable. *Ibid.*; see also *Briscoe* v. *Bell*, 432 U.S. 404, 413-414 & n.13 (1977) (where statute "on its face forecloses judicial review," *Leedom* v. *Kyne* cannot be invoked to circumvent it).

Moreover, *Leedom* v. *Kyne* itself clearly limits review to cases in which an agency violates a "clear and mandatory" statutory restriction on its authority. 358 U.S. at 188.[9] Petitioner can cite no provision in the environmental laws that clearly prohibits EPA's selection and implementation of a soil incin-

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[8] See, *e.g.*, *Boarhead*, 923 F.2d at 1020 ("Congress could hardly have chosen clearer language to express its intent generally to deprive the district court[s] of jurisdiction."); *Schalk*, 900 F.2d at 1095 ("The obvious meaning of this statute is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy."); *Alabama*, 871 F.2d at 1557 ("The plain language of the statute indicates that section 113(h)(4) applies only after a remedial action is actually completed.").

[9] In *Leedom* v. *Kyne*, the statute barred the NLRB from approving a certain union structure "unless a majority of such professional employees vote for" it. 358 U.S. at 185; 29 U.S.C. 159(b)(1). The NLRB, notwithstanding that statutory requirement, attempted to approve the union structure without ever holding a vote. 358 U.S. at 185.

eration remedial action in this case. If the mere allegation that an agency's discretionary action violates the statute were sufficient to bring a challenge within the exception provided by *Leedom* v. *Kyne*, that "narrow" exception would swallow the rule. See *General Finance Corp.* v. *FTC*, 700 F.2d 366, 370 (7th Cir. 1983); *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964).

5. Finally, petitioner contends (Pet. 19-24) that Section 113(h)'s preclusion of judicial review violates due process and a constitutional right of access to the courts.[10] That contention is without merit.

Under our judicial system, "[f]ederal courts are courts of limited jurisdiction," possessing authority to assert only the jurisdiction provided them by statute or by the Constitution. *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). While Congress created in CERCLA and RCRA statutory rights to sue the government under specified circumstances, it has—under the doctrine of sovereign immunity, among others—virtually unbridled discretion to withdraw them. See, *e.g.*, *Maricopa County* v. *Valley Nat'l Bank*, 318 U.S. 357, 362 (1943) ("[T]he power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations."); *Lynch* v. *United States*, 292 U.S. 571, 581 (1934) ("[C]onsent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn."). For

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[10] Petitioner also argues (Pet. 27) that Section 113(h)'s preclusion of judicial review deprives it of the equal protection of the laws. That argument was not raised below and thus is not properly before this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

this reason, the lower federal courts unanimously agree that Section 113(h)'s limitation on the jurisdictional grant—a limitation that existed before petitioner brought its suit—is unquestionably constitutional. See Pet. App. 17a; *Schalk*, 900 F.2d at 1098; *Hanford Downwinders Coalition, Inc.* v. *Dowdle*, 71 F.3d 1469, 1484 (9th Cir. 1995).[11]

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[11] The cases cited by petitioner (Pet. 19, 22-23) are not to the contrary. None involves the right to sue the United States, and all are distinguishable on other grounds as well. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), for example, held only that a State could not restrict access to state court divorce proceedings where the State itself had required use of "the judicial process" in the first place. *Id.* at 382-383. The Court was careful to explain that it was *not* holding that "access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause." *Id.* at 382. In *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), petitioner was given no notice of adoption proceedings regarding his child, causing him to lose his parental rights without due process of law. Petitioner does not claim a similar loss of rights or similar lack of notice here. In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), this Court held that it is arbitrary and therefore unconstitutional for a State to preclude access to administrative proceedings on the basis of its own procedural error. Here, Congress even-handedly eliminated judicial review for a good and non-arbitrary reason—to ensure that citizen suits would not unnecessarily delay urgent and necessary cleanup efforts. See note 4, *supra*. *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), and *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), both involve the propriety of activities conducted by employers in retaliation for the employees' union activities protected under the federal labor laws; they have no application here. Finally, *Gibbes* v. *Zimmerman*, 290 U.S. 326, 332 (1933), to the extent that it is relevant at all, stands for the proposition that a plaintiff has no constitutionally protected right "in any particular form of remedy." It thus does not support but rather undermines petitioner's position.

Besides, CERCLA does provide petitioner with opportunities to be heard. Although Congress placed limitations on judicial review of EPA's response actions in Section 113(h)—and deprived federal courts of jurisdiction over CERCLA citizen suit challenges to ongoing EPA remedial efforts—it also established extensive administrative opportunities for public comment, and requirements for EPA to respond to that comment. See 42 U.S.C. 9613(k), 9617; see also 40 C.F.R. 300.430(c) and (f)(3). Moreover, it is undisputed that, under Section 113(h)(4), petitioner will be free to bring a CERCLA citizen suit once EPA has completed its remedial action. No case cited by petitioner entitles it to anything more.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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